UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

INTERBAKE FOODS, LLC

AND CASES 05-CA-033158 05-CA-033330 05-CA-034261 05-CA-034775 05-RC-016210

BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION (BCTGM), LOCAL 68

James C. Panousos, Esq., Diana Orantes Embree, Esq., Daniel Heltzer, Esq., Katrina Woodcock, Esq., and Patrick J. Cullen, Esq., for the Acting General Counsel.¹

Mark L. Keenan, Esq., and Brennan Bolt, Esq., of Atlanta, Georgia, and Christopher M. Michalik, Esq., of Richmond, Virginia, for the Respondent.

James R. Rosenberg, Esq., of Baltimore, Maryland, and John Price, of Hilliard, Ohio, for the Charging Party.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Martinsburg, West

¹ For simplicity, I will refer to the Acting General Counsel as the General Counsel through the remainder of this decision.

Virginia, on numerous dates in 2008, 2009, and 2012.² The presiding officer throughout the trial was Administrative Law Judge John T. Clark. Due to Judge Clark's unfortunate illness, on January 9, 2013, the Chief Administrative Law Judge assigned the case to me for purposes of issuing a decision based on the existing record.³

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As to the unfair labor practice portion of this consolidated proceeding, BCTGM, Local 68 (the Union) filed the initial charge on July 17, 2006, and the General Counsel issued the initial complaint and notice of hearing on September 29, 2006. (GC Exhs. 1(a) and 5.) On October 23, 2006, the Union filed a second set of charges. (GC Exh. 1(c).) As a result, the Regional Director issued an order consolidating cases and an amended consolidated complaint on January 31, 2007. (GC Exh. 6.)

On March 14, 2007, the parties resolved the cases through an informal settlement agreement that required the Employer to post a notice and comply with its terms. (GC Exh. 7.) Four months later, the Acting Regional Director sent a letter to counsel for the Employer advising that the cases were closed and would remain so as long as there was continued compliance with the settlement agreement. (GC Exhs. 8 and 9.)

Procedurally, matters remained in this posture until April 21, 2008. At that time, the Union filed another set of unfair labor practice charges. (GC Exh. 1(dd).) In response, on July 31, 2008, the Regional Director issued a new consolidated complaint, an order revoking the parties' 2007 settlement agreement, and a notice of hearing. (GC Exh. 1(j).) The Employer filed its answer to the latest complaint⁴ and trial commenced on October 27, 2008. (GC Exh. 1(l).)

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² Those dates were: October 27, 28, 29, 30, and 31, 2008; November 3, 4, 5, 6, 7, 12, 13, and 14, 2008; December 8, 9, 10, 11, and 12, 2008; January 12 and 13, 2009; February 2, 3, 4, 5, 6, and 10, 2009; July 28, 29, and 30, 2009; and February 15, 2012.

³ Not surprisingly given the voluminous nature of that existing record, no party has sought leave to present any additional testimony or evidence. Like the parties, I agree that the record is entirely adequate to permit a complete resolution of the issues presented in this case. At a telephonic conference with the lawyers immediately after my appointment, it was noted that before taking any testimony Judge Clark had conducted a visit to the Employer's plant in the company of all parties. I advised the lawyers to file a formal written request if any party wished me to make a similar inspection. No such request has been received. After reading the entire record, I have concluded that such a visit is both unnecessary and impractical. Given the very lengthy period of time that has passed since the events at issue occurred, any attempt to examine the scene of those events would be problematic. More importantly, the existing record contains both a schematic diagram of the facility and a plethora of photographs of the relevant portions involved in this case. I am satisfied that there is no need for any inspection.

⁴ In its various answers, the Employer has pled certain procedural defenses, including the Act's statute of limitations. To the extent that it has not raised any of these issues at trial or in its briefs, there is no need to address the merits of those defenses. See *SBC Midwest*, 346 NLRB 62, 64, fn. 8 (2005).

During the course of the trial, the Union filed another charge on February 23, 2009. (GC Exh. 148-A, p. 1.) This was amended on May 12, 2009, and resulted in the issuance of another complaint and notice of hearing on May 28. (GC Exh. 148-A.) On June 5, 2009, the Regional Director filed a motion to consolidate the new complaint with the existing case. (GC Exh. 148-B.) Judge Clark granted this motion. (GC Exh. 148-E.) Thereafter, the Regional Director filed a final amended complaint⁵ and the Employer filed its answer. (GC Exhs. 148-H and I.) The Employer also filed a motion for partial summary judgment which was denied by the Board on July 27, 2009. (GC Exh. 148-N.)

These unfair labor practice allegations are consolidated with a representation issue. As part of its effort to organize the Employer's work force, the Union filed an election petition on September 19, 2006. (Tr. 576.) Although an election was scheduled for October 26, 2006, it was eventually blocked due to the existence of unresolved unfair labor practice allegations. Shortly after those matters were concluded through the parties' settlement, the Union and the Employer entered into a private election agreement. (R. Exh. 6.) Pursuant to that agreement, an election was held on April 12, 2007. Voters cast 67 ballots for the Union and 129 against representation. (Tr. 2554.)

Another attempt to organize the employees commenced in early 2008. On March 12, 2008, the Union filed a second election petition. This was later amended for technical reasons. (GC Exhs. 1(f) and 118.) The Region scheduled a representation hearing on March 21 and conducted the election on April 16, 2008. The tally of ballots showed 97 votes for the Union and 100 votes against representation. In addition, there were 5 challenged ballots.⁶ Given the closeness of the vote, the challenged ballots are potentially dispositive.

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The Union filed 12 objections to the Employer's preelection conduct. (GC Exh. 1(m), exh. 1.) On August 5, 2008, the Regional Director issued his report on objections and challenged ballots. (GC Exh. 1(m).) He noted that the Union had withdrawn all of its objections with the

⁵ While this was the last formal filing, in its April 15, 2009 posttrial brief the General Counsel sought to amend the complaint to add yet another alleged violation of Sec. 8(a)(1). (GC Br., at p. 38, fn. 44.) I do not hesitate to deny the motion to amend as it is plainly untimely. It can hardly be contended that the Due Process Clause permits the Government to file a new charge after the parties have all rested their cases and the record has been closed. See *New York Post Corp.*, 283 NLRB 430 (1987) (error for trial judge to grant motion to amend the complaint when that motion was not made until the final day of the trial), and *Stagehands Referral Service*, *LLC*, 347 NLRB 1167 (2006) (trial judge properly denied motion to amend made after the respondent had rested its case).

⁶ One of the challenges was subsequently withdrawn. The remaining four involve the following employees, all of whom had been discharged prior to the date of the election: John Robinson, Milo Malcomb, Phillip Underwood, and Clyde Stovall. The General Counsel contends that each of these employees was discharged unlawfully. As a result, each of the ballot challenges turns on the outcome of unfair labor practice allegations.

exception of those alleged in paragraphs 5, 6, 8, and the second portion of paragraph 4. (GC Exh. 1(m), p. 2.) As the remaining objections and ballot challenges all involve conduct alleged to constitute unfair labor practices, the Regional Director consolidated the representation issues with the unfair labor practice proceedings. (GC Exh. 1(m), p. 3.)

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The trial in this matter was interrupted by a very lengthy delay from mid-July 2009 through early 2012. This was occasioned by the parties' extensive litigation of subpoena enforcement issues in the federal courts. See *NLRB v. Interbake Foods, LLC,* No. RDB 09-2081, 2009 WL 3103819 (D. Md. September 22, 2009); *NLRB v. Interbake Foods, LLC,* 637 F.3d 492 (4th Cir. 2011); and *NLRB v. Interbake Foods, LLC,* No. RDB 09-2081, 2011 WL 6736435 (D. Md. December 21, 2011). Given the ultimate outcome of this litigation, there are no outstanding subpoena issues to be addressed in this decision.

The substantive issues in this case involve resolution of the General Counsel's contention
that the Employer has violated multiple provisions of the National Labor Relations Act (the Act).
The alleged violations of Section 8(a)(1) include surveillance of employees' protected activities
and the creation of an impression of such surveillance; unlawful interrogations regarding
protected activities; threats against employees due to their involvement with the Union⁷;
prohibiting discussion of the Union on the production line; removal of union literature from the
Employer's facility; calling the police in order to disrupt lawful handbilling activities;
maintaining an unlawful media relations policy; and implementing new work rules in response to
union activity.

The General Counsel also contends that the Employer engaged in unlawful discrimination against employees in violation of Section 8(a)(3) by issuing written warnings, making an unfavorable work assignment, and suspending employees. More significantly, the General Counsel asserts that the Employer engaged in the ultimate form of discrimination prohibited in Section 8(a)(3) by terminating the employment of the following employees as an unlawful response to their protected activities: Phillip Underwood, Connie Nelson, Christina Duvall, Milo Malcomb, Clyde Stovall, John Robinson, and Melissa Jones. Finally, it is alleged that the discharge of Melissa Jones also violated Section 8(a)(4) because it was unlawfully motivated by Jones' participation in this trial.⁸

For reasons that will be described in detail in this decision, I have concluded that the General Counsel has met his burden of proving that, at various times over the course of the three-year

⁷ During the trial, the General Counsel withdrew one allegation concerning the alleged utterance of an unlawful threat which had been set forth in the complaint at GC Exh. 1(j), par. 13(c)(iii). (Tr. 2697.)

 $^{^{8}}$ It is also asserted that Jones' discharge represents an independent violation of Sec. 8(a)(1). (See Tr. 3541.)

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period under examination in this case,⁹ the Employer committed violations of Section 8(a)(1) consisting of the utterance of threats against its employees due to their protected activities; prohibiting talk about the Union on the production line; removing union literature from the breakroom; unlawful surveillance and the creation of an impression of such surveillance; summoning the police in order to disrupt lawful handbilling; promulgating an amendment to its existing solicitation and distribution policy in response to union activity; and maintaining an unlawful media relations policy in its handbook. I have also found that many other alleged violations of Section 8(a)(1) have not been established.

The General Counsel's claims of unlawful discrimination have been assessed using the Board's long-established modes of analysis. While I conclude that the Employer did harbor some degree of unlawful animus which the discipline and discharge of union supporters would serve to gratify, I have also found that each of the disciplined and discharged employees engaged in clearly demonstrable and serious forms of misconduct. Ultimately, I have determined that each of those employees would have been sanctioned in the same manner regardless of their involvement with the Union and regardless of the Employer's attitude toward their protected union activity. As a consequence, the General Counsel has failed to meet his burden of proving that any of the alleged discriminatees were unlawfully disciplined or discharged.¹⁰

Turning to the representation issues, in light of my findings regarding the lawfulness of the discharge of the four employees who voted in the election, I sustain the challenges to their ballots. For reasons I will discuss at the appropriate point in this decision, I also find that the Employer engaged in one instance of misconduct as alleged in the Petitioner's objections. However, because of the isolated and relatively minor nature of this misconduct, I have found it virtually impossible to conclude that it would have affected the results of the election. Therefore, I will recommend that those results, as amended, be certified.

On my review of the entire record¹¹ and after considering the two sets of briefs filed by both the General Counsel and the Employer, I am prepared to make the following findings of fact. In

 $^{^{9}}$ The earliest allegation dates from March 2006, while the most recent is alleged to have occurred on February 20, 2009.

¹⁰ Similarly, regarding the alleged violation of Sec. 8(a)(1) and (4) concerning Melissa Jones' discharge, I find that the Employer has shown that Jones engaged in behavior considered to be very serious misconduct by the Employer and would have been discharged for such unprotected behavior regardless of her protected union activities and regardless of her involvement in this litigation on behalf of the Charging Party and the General Counsel.

¹¹ During my telephone conference with the lawyers, I asked whether any party believed that there were material or significant errors in either the transcript or other portions of the record. No such issues have been raised. I have taken the liberty of redacting a Social Security number from R. Exh. 9 and herewith direct the Board's staff to make the same redaction to any additional record copies of this document.

making such determinations where the testimony is in conflict, I am necessarily constrained by my inability to have observed the demeanor of the witnesses as they testified. This is not an uncommon problem.¹² In *Northridge Knitting Mills*, 223 NLRB 230, 235 (1976), a judge's retirement resulted in the Board making the necessary factual findings for itself. In the process, the Members observed that:

[W]e are mindful of our initial responsibility to determine credibility because of the several sharp conflicts in the testimony on this record. As the parties recognize, our task is made more difficult in this respect because we do not have the opportunity to make our credibility findings on the demeanor of the witnesses. Nonetheless, it is abundantly clear that the ultimate choice between conflicting testimony also rests on the weight of the evidence, established or admitted facts, inherent probabilities, reasonable inferences drawn from the record, and, in sum, all of the other variant factors which the trier of fact must consider in resolving credibility. [Citation omitted.]

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See also *Trim Corp.*, 349 NLRB 608 (2007) (replacement judge's credibility findings affirmed where he had applied the criteria discussed in *Northridge*).

FINDINGS OF FACT

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I. JURISDICTION

The Employer, a Delaware limited liability corporation, manufactures bakery products at its facility in Front Royal, Virginia, where it annually sells and ships from its Front Royal, Virginia facility, goods valued in excess of \$50,000 directly to points located outside the Commonwealth of Virginia. The Employer admits, ¹³ and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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¹² For example, I have addressed this issue twice before on my own docket in *CMC Electrical Construction & Maintenance, Inc.*, 02-CA-035489, JD-58-06 (October 10, 2006) (where misconduct was alleged, Board ordered remand to a different judge for issuance of a new decision), and *American Directional Boring*, 14-CA-027386, JD-35-07 (August 23, 2007), affd. 353 NLRB 166 (2008) and 355 NLRB 1020 (2010) (remand of case where original trial judge had retired).

 $^{^{13}}$ See the Employer's answers at GC Exh. 1(l), pars. 2(b) and (c) and GC Exh. 148(i), pars. 2(b) and (c).

II. ALLEGED UNFAIR LABOR PRACTICES

A. General Consideration

In describing and analyzing the facts and circumstances revealed in this lengthy record, I am mindful of the need to take into account the full context of the unfolding events. In other words, it is not sufficient to simply describe the Union's organizing efforts, the employees' involvement in those activities, and the Employer's actions taken while those occurrences were ongoing. Such a narrow focus on the labor relations aspects of the parties' history over these years is inadequate to the analytical task required under the Act and the Board's precedents. As the Board has counseled in the context of an alleged discriminatory personnel action:

While the General Counsel may rely on circumstantial evidence from which an inference of discriminatory motive can be drawn, the totality of circumstances must show more than a mere suspicion that union activity was a motivating factor in the decision. [Emphasis added. Citation and internal punctuation omitted.] Cardinal Home Products, 338 NLRB 1004, 1009 (2003).

In order to properly place the Employer's actions in their full context, I will describe both the parties' labor relations history and the significant overall developments in the life of this newly-established manufacturing facility. Only in this manner can the necessary legal conclusions be drawn from the full context in which the parties operated.

B. Background Events

Interbake Foods, LLC, has a venerable corporate history going back to the last year of the Nineteenth Century when its ancestor, Southern Biscuit Company, was founded in Richmond, Virginia. Over the years, the Company has produced many well-known baked products such as Girl Scout cookies. In 1945, it was acquired by George Weston Limited and two decades later it was integrated into a larger operation known as Interbake Foods. Interbake is a Delaware limited liability corporation owned by Weston.

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The controversies involved in this case arose from Interbake's decision to close antiquated plants in Elizabeth, New Jersey, and Richmond, Virginia. Their operations were to be transferred to a new facility in Front Royal, Virginia. That plant entered production in November 2005 and reached full operating status in approximately mid-2006. It is a very large facility consisting of 400,000 square feet, including warehouse space. The facility operates six production lines numbered (a bit oddly) as lines zero through five. It produces wafers and

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¹⁴ Given the unusually large number of individual allegations involved in this case, in the account that follows, I will not discuss every individual allegation. My purpose is to describe the overall course of events and to highlight those circumstances that go to the core understanding of the parties' behavior and motivations. During my subsequent legal analysis, I will provide specific details regarding the facts of each alleged unfair labor practice and the outcome of my legal analysis for each allegation.

crackers, including a cracker produced for the Federal Government. The Company's largest customers are also some of the largest food producers in the world, including Nestle, Kraft, and Unilever. Not surprisingly, the scale of production is vast. Between 90 and 100 million pounds of food products are produced each year.

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In order to maintain this level of operations, the Company employs approximately 200 hourly employees and 80 to 100 temporary employees supplied by a contractor. Since the plant entered full operating status, employees are assigned to work around the clock on three shifts.

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As the new Front Royal facility hired employees and began production, one of those employees, Keith Jones, contacted an official of the BCTGM, in order to seek assistance in organizing the new work force.¹⁵ Weston and Interbake were familiar to the Union because it represents units of employees at various Weston facilities, including an Interbake plant in Iowa. In fact, the Union reports that it represents over 4500 Weston employees around the country.

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After Jones' initial contact with the Union in late 2005, other employees became involved in organizing efforts. Prominent among these employees was John Robinson, a forklift driver. Robinson and others began soliciting coworkers to sign union authorization cards. In an indication of the timing of the early organizing efforts, Robinson signed his own union authorization card on March 18, 2006. (GC Exh. 86; Tr. 656.)

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C. The Company's Early Operations and the 2006-2007 Organizing Campaign

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It is undisputed that in the early months of operation, the Front Royal facility experienced a variety of severe growing pains. Production Manager Del W. Schleuss characterized the situation in those early months as "chaos," due to unanticipated difficulties involved in shutting down operations at the old facilities, transferring those operations to Front Royal, and meeting customer expectations in the process. (Tr. 2922.) Among the difficulties were equipment installation issues, inexperienced staff, and a shortage of supervisory personnel.

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Against this backdrop, the Company made initial reactions to the employees' union activities. The General Counsel presented testimony about this from a rather unusual source, a former supervisor named Sharon Pence.¹⁶ Pence testified that management became aware of the union

¹⁵ Jones does not figure prominently in this case because he subsequently voluntarily left the Company's employ.

¹⁶ It is essential to view Pence's testimony in this case with great caution. Pence was discharged by the Company in May 2007 for what it viewed as an inappropriate relationship with a production employee named Cathy Stickley in violation of its fraternization policy. Pence readily conceded that she was unhappy with her former employer and believed she had been treated unfairly. Given that her discharge arose from her relationship with Stickley, a union supporter, Pence must be considered as a biased witness. I credit only so much of her testimony as is generally consistent with other reliable evidence.

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organizing activity in April 2006. She indicated that supervisors were told to "watch union supporters," including Robinson and William Keyes, among others. (Tr. 2314.) She added that they were also told to make sure Robinson "doesn't talk to people going from his work area to the break room," and to try to break up groups of employees. (Tr. 2315.) Employee Carol Carter testified that, during this period, Pence would observe her when she engaged in conversations with Robinson.¹⁷ Significantly, prounion activist Sheila Kniceley testified that, while supervisors kept a close eye on Robinson, she never saw them watching him other than on the production floor.

On close inspection, Pence's assertion that managers were instructed to observe and intervene in organizing activity turns out to be more complicated and ambiguous than the impression she gave on direct examination. Thus, on cross-examination, Pence conceded that the intent behind the directive to break up groups of employees was "that we weren't having these huddles of employees, that people were going back to their jobs after break and getting back to work." (Tr. 2355.) [Counsel for the Employer's wording.] She confirmed that this had been an ongoing problem of supervision at the new facility. She also agreed that the managerial staff wanted to comply with the law regarding union organizing activities.

Pence's account serves as relevant background to the issuance of a disciplinary citation to Robinson on May 11, 2006. It was issued by Production Manager Larry Tomasiello. The written warning was for Robinson's "carrying on very lengthy conversations when you should have been working." (GC Exh. 88.) In a comment that Robinson wrote on the disciplinary report, he provided considerable insight into the Company's problems in getting production up and running at the new facility. Robinson candidly explained that there was, "[n]ot enough work to keep me busy!" (GC Exh. 88.) [Punctuation in the original.] When asked why Robinson chose to make this written annotation to the disciplinary report, his response was quite peculiar. He observed that, "there just wasn't enough work to keep me busy and I was afraid they were going to fire me." (Tr. 659.) It is difficult to understand this testimony, since it hardly seems that this annotation would help to preserve Robinson's job. To the contrary, it appears likely that a reasonable supervisor would not be placated by such a comment on a disciplinary form.

One month later, Robinson was issued a second disciplinary warning written by Judy Underwood, at that time the director of human resources. This was dated June 13, and stated that Robinson had been "observed out of your work area on [June 13], talking to a fellow employee for approximately 10 minutes." (GC Exh. 89.) The warning notice also noted that two employees had complained that Robinson, "approached them while they have been working;

¹⁷ Carter also stated that Supervisor Brian Johnson observed her speaking to Robinson and asked her what they had been talking about.

¹⁸ Of course, this defense of his conduct fails to take into account the Employer's interest in not having other employees distracted from their work by Robinson's social interactions.

soliciting them with cards, telephone numbers, and verbal information to attend meetings." (GC Exh. 89.) The write up explained that this conduct violated the Employer's solicitation and distribution policy and warned that further infractions could lead to additional discipline, including termination.

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Robinson testified that the precipitating incident for this discipline had involved a fellow employee, Connie Gardner. While he was operating his forklift, she had approached him to request that he obtain some feed liners for her. He contended that this conversation was brief and lasted, "[a] minute." (Tr. 686.) It should be noted that, while Gardner did not testify about this event, she was also issued a disciplinary warning. In her write up, Underwood reported that Gardner had conceded that she and Robinson "had also discussed personal things during that time." (GC Exh. 38.)

Several days later, Robinson's supervisor, Brian Johnson, told him that "my new job would be in the grinding room." (Tr. 688.) The grinding room was in a separate area of the production facility. There is no dispute that this new work assignment provided fewer opportunities to move around the facility and engage in conversations with other employees. The work was physically demanding as it involved shoveling mix into barrels in a hot and humid environment. Robinson remained in this assignment for roughly 6 weeks, until the end of July or beginning of August. At that time, he was reassigned to the mixing room.

While Robinson's interactions with coworkers were coming under scrutiny, another employee also became involved in both organizing activity and disciplinary action. William Keyes began working at Interbake in March 2006 as a mixer. He later served as a baker and machine operator. In May, Keyes began handing out union literature and wearing union insignia. Keyes reported that among his organizing activities was the repeated solicitation of a fellow employee, Maria Alvarez. He contended that, while she told him she could not afford to pay union dues, she never expressed any complaint to him about his repeated solicitations.

On June 15, in response to a coworker's complaint, Keyes was issued a written warning by Underwood for violation of the Employer's solicitation and distribution policy. In his testimony, Keyes assumed that the coworker was Alvarez and I agree with his assumption. The write up noted that Keyes had approached her several times against her wishes and that these contacts "were made in the production area during work." (GC Exh. 80.) In his account of the incident, Keyes confirmed that he knew of the Company's policy against solicitation "when you're on the clock and not on break or in the rest room or somewhere like that." (Tr. 633.) [Counsel for the Employer's words.] He indicated that he had encountered Alvarez in an area of the facility "where they had stored different parts of machinery to be assembled, as they were still assembling line." (Tr. 626.) He conceded that he did not know if she was on break and that he assumed that she "was going back to her work station." (Tr. 634.)

 $^{^{19}}$ The Employer has since automated this process.

As part of the 2006 organizing activity, union supporters placed prounion literature in the breakroom. Shawnee Burcker, a machine operator, testified that on May 19 she entered the breakroom and observed Sanitation Manager Ken Heishman reading the union literature. After he finished, "then he picked up the remaining pieces of literature on the table and carried them out of the room." (Tr. 2438.) On cross-examination, Burcker agreed that Heishman's department was responsible for daily cleaning of the breakroom. Nevertheless, she staunchly maintained that she had never seen Heishman remove anything from the breakroom. Furthermore, on the day in question, he removed all of the union literature and nothing else. ²⁰

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After several months of initial organizing activity, union officials made contact with the Employer's management. On May 23, a letter was addressed to Plant Manager Denise Bullock advising her of the organizing effort. While the letter made reference to the "many" existing collective-bargaining agreements between the Union and Weston's various entities, it also warned that, in the event of management misbehavior toward union supporters, the Union "will be prepared to document any unfair labor practices that occur, and to seek appropriate legal remedies." (R. Exh. 4, p. 1.) This letter was followed by an email complaining that managers at Front Royal had been employing unlawful tactics against the Union. The email noted that such behavior was "out of character" for Weston. (R. Exh. 1, p. 2.) After this, a meeting was held in June between union officials and Weston's labor relations leadership. At this meeting, the Union sought voluntary recognition for the Front Royal facility. Management declined, citing the fact that the plant was still in the start up phase of operations.

During this period, on June 6, the Union engaged in overt organizing by distributing handbills outside the entrance to the Front Royal plant. This activity began at 5:30 a.m., a period of shift change. After 10 minutes, a plant security guard approached and asked what the union officials were doing. He was told that they were trying to organize a union. The guard directed them to leave and then returned to the guard shack and was observed to make a telephone call. Within half an hour, police arrived and interviewed the guard and the union organizers. The officers stated that they did not know if the Union was violating any laws and they would look into it and return later in the day.

The union officials resumed handbilling at approximately 2 p.m., during another shift change. Prior to arriving at the plant entrance, they had telephoned the police to notify them of the upcoming activity. The police assured them that they could continue their activity. Keyes reported that he encountered Plant Manager Bullock "at the guardhouse" as he drove past the handbillers and into the plant. (Tr. 619.) She waved to him. Robinson testified that he participated in the handbilling and watched Bullock walk out to the guard shack and stand there. He reported that, as employees drove into the facility; Bullock "would stop and ask them for the

²⁰ Burcker's uncontroverted testimony about this incident is corroborated by her contemporaneous note briefly describing the event. (GC Exh. 114.)

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literature back." (Tr. 676.) Additionally, one of the Union's officials, Gary Oskoian, testified that Bullock remained at the guard shack for a period of 20 minutes. She spoke to employees as they drove past the guard shack. He reported that he overheard one conversation during which she told an employee that, "I'm sorry you have to go through something like this." (Tr. 520.) After this first effort, the Union engaged in similar handbilling approximately three to five times during the 2006 campaign.

On July 17, the Union filed unfair labor practice charges alleging that Robinson had been subjected to unlawful surveillance; that both Robinson and Keyes had been victims of discriminatory personnel actions; and that managers had removed union literature and threatened and interrogated employees.

Earl Meyers, a forklift driver, reported that in September the Employer again removed union literature from the lunchroom. While Meyers was eating his lunch, he observed Joanne Snyder present with some coworkers. Snyder is a human resources official.²¹ Also present was Michael Teeg, an employee in the sanitation department. Teeg was "wandering around, cleaning up a little bit." (Tr. 2260.) At this time, the lunchroom contained prounion literature, antiunion literature, and newspapers. Meyers watched as Snyder read both sides' handbills and the newspapers. Eventually, she placed handbills and newspapers in the trash and departed. On careful questioning, Meyers repeatedly confirmed two key points. First, Snyder discarded both pro and antiunion handbills. Second, after Snyder had left the room, "there were union and company handbills left" in the lunchroom. (Tr. 2262.)

In mid-September, the Union filed its petition seeking a representation election.²² On the next day, Robinson was issued a final written warning signed by Underwood. The form stated that "[w]e have received a written complaint made by an employee that you approached this employee in the work area, soliciting this employee with a paper." (GC Exh. 90.) Robinson testified that, during his meeting with Underwood, she told him, "that I had given a union paper to one of the employees on the floor, and he was complaining about it." (Tr. 696.) She added that she "didn't want to see me get fired, and she meant that from the bottom of her heart." (Tr. 696.) On the next day, the Union filed a request to proceed with the representation election despite the pendency of unfair labor practice charges.

Matters continued to develop along the same lines in the autumn. Schleuss reported that, while the Company had managed to get all six production lines running, they were still

²¹ The Employer has stipulated to her supervisory status. See Tr. 286.

²² Actually, the Union filed two such petitions, dated September 14 and 19.

experiencing production problems. As a result, the facility was not profitable during that entire year. Indeed, Schleuss testified that the Front Royal operation lost \$6 million for the year.²³ Two other themes recurred at that time, involving the Employer's efforts to cope with literature and with Robinson's nonwork activities. Thus, employee Carter testified that in October she observed Jill Slaughter, a human resources employee²⁴, in the women's locker room talking to a sanitation employee known to her only as Wanda. At that time, Slaughter "picked up the union flier that was laying on the bench" in the locker room. (Tr. 1784.) She took the flier with her. During this brief event, Carter reported that Slaughter stated that "she was checking to make sure the bathrooms were clean." (Tr. 1784.)

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The Regional Director had scheduled the representation election for October 26. However, on October 20, the Union requested that the election be blocked due to alleged unfair labor practices, particularly the issuance of a final written warning to Robinson on September 20. On October 23, the Union followed this with a new set of unfair labor practice charges alleging threats, promises, interference, and discrimination against union supporters. Given this situation, the election was blocked, bringing the 2006 organizing campaign to a temporary halt.

Matters remained in this state until March 14, 2007, when the parties concluded a settlement agreement resolving the unfair labor practice charges that had gone to complaint. Two days later, the parties also reached agreement on a private election process. Among the significant terms of this accord were a commitment from the Employer to grant entrance to the facility to two union officials who were to be provided with a table and chairs inside the facility in order to have access to the work force prior to the election and a commitment from the Union that, in the event it lost in the balloting, it would refrain from further organizing activity for 9 months and would not seek a second election until the passage of 1 year.

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In order to implement their agreement, the Employer and the Union conducted a joint meeting to explain procedures to the employees. John Price, the International Union's representative, testified that the work force was informed that the parties had executed a "neutrality agreement and . . . that union reps would be in the hallway." (Tr. 2551.) The election was held on April 12, 2007, and resulted in a vote of virtually two-to-one against the Union. On July 13, the Regional Director wrote to the Employer's counsel to advise that the prior unfair

²³ An indication of the seriousness of the situation was the termination of Plant Manager Bullock in January 2007. Schleuss testified that this resulted from the facility's perceived poor performance.

²⁴ At this time, Slaughter was the plant's assistant HR manager. The Company has stipulated that she was an agent for purposes of the Act. On August 1, 2007, she was promoted to HR manager and it is further stipulated that she became a statutory supervisor at that point. She figures prominently in the events that unfolded in 2008 and 2009.

²⁵ At trial, the Union conceded that the Company had conformed its conduct to the terms of the private election agreement.

labor practice case was being closed due to the Company's compliance with the parties' settlement agreement. As had also been agreed between the parties, the Union ceased its organizing efforts for the remainder of 2007.

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D. The Union's 2008 Organizing Campaign

During this period in 2007, the Employer took significant steps to address a recurring problem within the facility that was undermining the success of the entire operation. The undisputed testimony was that there had been a series of industrial accidents, some of which had involved serious injuries. To remedy this problem of industrial safety, the Company chose to adopt as a model the Dupont Safety Management System. Indeed, the agenda for the March 2007 meeting with the Union listed the "new Dupont Safety Program" as a specific agenda item. (GC Exh. 85, p. 1.)

On the same day as the election, managers engaged in email correspondence indicating that they were increasing the emphasis on safety and tightening the disciplinary policies to that effect. The Company's safety and environmental manager, Don Gronczewski, emailed the new plant manager and the head of human resources to advise that he had "explained the safety rules to everyone at this facility," but had observed an employee cleaning the underside of a conveyor belt without first locking out the conveyor's power source. He issued a disciplinary notice to the employee and advised that the line supervisors must inspect the lock out situation when their staffs are working under the conveyors. He explained that "[i]f it is not locked out[,] disciplinary action should be taken." (GC Exh. 16.)

The safety manager's reference to "locking out" refers to the Company's so-called "lock out/tag out" process. Each employee is issued a lock and identity tag to be used when that individual is working on equipment that is connected to a power source. The employee is required to lock out the power source. The attached identity tag is intended to inform coworkers that the employee has shut out the power source and is working on the equipment. This procedure is designed to prevent one employee from mistakenly powering a piece of equipment while a coworker is exposed to danger on that piece.

In his response to Gronczewski that was also sent to all line supervisors, the new plant manager, Nick Kantner, issued the following instructions:

Lock out tag out must be enforced for the good of all. I have been around machinery many years and witnessed disasters on a

production floor which I do not want to happen ever again. Don [Gronczewski] you have my full support and a 0 tolerance policy on this issue.²⁶

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(GC Exh. 16.)

In autumn of 2007, the Company's enhanced focus on safety issues was reinforced at a corporate safety conference held under the parent organization's auspices at Weston's headquarters in Pennsylvania. At the conference, Weston's head of baking addressed the participants, instructing them that "we must improve safety to remain a profitable business." (Tr. 3198.) The goal was to "shoot for zero accidents." (Tr. 3199.) Numerous materials from this conference were introduced into the record and are consistent with the witnesses' descriptions. (See R. Exhs. 66, 67, and 68.) In vivid language that anyone interested in labor relations can only applaud, the conference training materials state: "We Will Not Chew Up People to Make Money." (R. Exh. 66, p. 4.) [Capitalization in the original.] Key aspects of the safety policies were listed as, "Drive safety as a means to business success," and "Hold your people accountable." (R. Exh. 67, p. 5.)

The testimony, which is entirely corroborated by the contemporaneous documentary record, reflects that the managers at Front Royal were enthusiastically committed to this enhanced focus on safety. As Gronczewski explained, "I was actually very happy to hear that the top of the organization from Weston wants to drive the safety message forward even more." (Tr. 3201.) Previously, the policy regarding lock out/tag out violations had been that a first offense would result in a written warning and a second offense would require termination. (See R. Exh. 98.) Schleuss testified that this was changed to a zero tolerance policy that required termination for even a first violation of lock out/tag out. Gronczewski confirmed that "we actually instituted a mandatory lock out/tag out policy" which he defined as a "no tolerance policy, meaning that if you choose not to lock out equipment, you would be terminated from Interbake Foods." (Tr. 3203.)

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²⁶ At this juncture, it is appropriate to note that I have placed great weight throughout this decision on the documents that were written as the events were unfolding. Thus, to the extent that the General Counsel has contended that certain company policies served as mere pretexts for discrimination, I have relied on the contemporaneous written record in my analysis. In according such evidence a high degree of probative value, I have used an evaluative technique approved by the Board. See *Granite Construction Co.*, 330 NLRB 205, 208, fn. 11 (1999) (letter written at the time of the event is given greater weight than contradictory testimony at trial), and *Domsey Trading Corp.*, 351 NLRB 824, 836, fn. 56 (2007) (process of according greater weight to documentary evidence is "consistent with Board law").

²⁷ The record is replete with indications that Gronczewski was deeply committed to the goals of industrial safety and health that were the focus of his task as safety and environmental manager. No witness ever expressed doubt as to the sincerity of his commitment to this work.

As with other issues of disputed motivation, I have turned to the contemporaneous written material to seek confirmation of the testimony regarding the genuine intention to strictly enforce the lock out policy. The record is replete with confirmatory materials. Thus, Human Resources Manager Slaughter announced the zero tolerance policy at a meeting in November 2007. Respondent's Exhibit 18 consists of the slides she used in making her presentation. Shortly thereafter, the policy was invoked to discharge a lock out violator, Ben Wilson. Respondent's Exhibits 69 and 70 document his termination for standing in a dough trough without first locking it out. Indeed, Schleuss emailed various managers to observe in this connection that, "[t]ermination is the only correct path on lockout tagout violations." (R. Exh. 69.)

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Additional corroboration as to the genuine and serious emphasis now being placed on lock out violations comes from a meeting conducted in the following month by Gronczewski. He testified that he told the assembled employees at the meeting on December 11, "[I]f you choose not to lock that equipment, you cannot work for Interbake Foods." (Tr. 3207.) Once again, the Employer has submitted clear corroborative documentation consisting of the slides from this presentation. (See R. Exh. 20.)

As 2007 drew to a close, interest in organizing the work force was renewed among the Union's supporters. Authorization cards were passed around and the topic was a frequent subject of conversation in the plant. As the campaign intensified, union supporters have alleged that various supervisors issued instructions that employees were to refrain from discussing the Union, particularly with coworkers who were strongly identified as prounion. With equal emphasis, the supervisors accused of this conduct have asserted that they never made such statements or issued such directives.

The evidence reveals that, with the coming of the New Year, workplace safety remained a substantial problem at the Front Royal facility. In January 2008, one employee injured his hand while repairing a piece of equipment, while another cut his leg when stepping over a conveyor belt. At this time, the Employer instituted another safety program that provided for cash awards to be given to employees who reported unsafe acts or conditions. (See GC Exh. 40.)

Also at this time, the first incident occurred that involved the discharge of an employee that is contended to have been due to the Employer's unlawful discrimination against union supporters. The employee involved was Phillip Underwood, who had been employed as a machine operator on line 5 during the third shift. His immediate supervisor was Janet Anderson. Overall operation of line 5 was managed by Dennis Henline. Although Henline bore the overall responsibility for the line, he was not physically present on the third shift and the supervision of the line on that shift fell to Anderson.

 $^{^{28}}$ There is no allegation that Wilson was a union supporter or that his discharge was unlawfully motivated to any degree.

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It is clear that Underwood and Anderson had a contentious relationship. Their disputes culminated in Underwood's discharge based on an incident that occurred on January 9, 2008. The numerous witnesses who testified for both sides as to these events agreed that there were two issues involved in the argument between Underwood and Anderson that night. The first issue concerned Anderson's demand that Underwood notify the baker whenever he experienced difficulties in operating his equipment. The second item concerned Anderson's direction to Underwood to make a written record of every period of machinery downtime that he experienced during his shift. Underwood believed that these requirements were inefficient and at variance with the work rules mandated by the overall supervisor of line 5, Henline.

It is also undisputed that, when Anderson instructed Underwood to call the baker and record the downtime regardless of the brevity of the period of interruption of production, Underwood declined, citing his belief that Henline had a contrary policy. In response, Anderson became angry, noting in her testimony that "I've been a supervisor a long time, but I've never had somebody tell me no, that they weren't going to do what I asked." (Tr. 3365.) As a result, she made the decision to send Underwood home on suspension.

Over the next few days, HR Manager Slaughter conducted an investigation of the
Underwood incident. She interviewed Underwood and a coworker, Vickie Whittington. She
also examined Underwood's personnel records which contained substantial documentation of
problems, particularly in the area of interpersonal relationships and insubordinate behavior.
Slaughter testified that the decision was made to terminate Underwood's employment. This was
the consensus among herself, Schleuss, and Operations Manager Mark Cahill and was based on
the fact that he had "refused to do something that he was told to do." (Tr. 149-150.)
Underwood's termination notice cited the reason for his discharge as, "insubordination." (GC
Exh. 12.)

Later that month, the Employer made the first in a series of controversial discharge decisions premised on safety violations. The employee at issue was Connie Nelson, a cleaner and relief operator on the third shift. The precipitating incident took place on January 20 when Nelson and coworker, Melanie Johnson, were cleaning a roller on line zero. As Nelson described it, after cleaning this roller, she was "pushing the roller back over to go into position." (Tr. 1292.) As she did so, the tension on the belt, "caused it to flip out and go down on the floor, and as it did that, when the other end went down, it came up and pinched my hand." (Tr. 1292.)

Nelson reported the incident to her supervisor, Anderson. Anderson prepared an accident report and the safety manager, Gronczewski, conducted an investigation that included interviews with Nelson and Johnson. Johnson informed him that, at the moment of the accident, she had been preparing to grab the roller but Nelson had "pushed it through" before she was ready to receive it. (Tr. 423.)

Gronczewski's investigation also involved the examination of Nelson's personnel records which documented six prior industrial accidents and injuries during the approximately eighteen

months that Nelson had worked at Front Royal. The results of Gronczewski's investigation were forwarded to Slaughter, Schleuss, Cahill, and Kantner. They decided to terminate Nelson's employment. Slaughter summarized their conclusion that "[b]ecause of the pattern of her injuries and accidents she had proven that she was [an] unsafe worker and had no regard for her own safety." (Tr. 162-163.) Nelson was terminated on January 23.

On the same date, a second employee, Agnes Coburn, was issued a written warning that is also contended to represent an instance of unlawful discrimination. Coburn was a break relief operator on the second shift. On January 22, she had been working as a relief inspector on the wafer inspection station. A production problem caused a load of bad wafers that were stuck together to come down the line. Coburn swept them off the conveyor and onto the floor. After normal production was restored, she observed that coworkers were walking through the dumped wafers and she believed that this was a safety hazard. As a result, she elected to begin sweeping up the dumped wafers.

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While she was cleaning up, Supervisor J.P. Halterman came up to her and stated, "Agnes, I need you to stop sweeping the floor and keep an eye on the wafers [coming down the production line]." (Tr. 166.) She replied that she was watching the line while sweeping. He responded, "[O]kay. Well, why don't you just put the broom down and watch the wafers." (Tr. 1233.) She complied. Approximately 10 minutes later, Halterman observed Coburn, "sweeping the floor again and not watching the line." (Tr. 3292.) In consequence, Halterman issued a written warning to Coburn, citing her for "poor performance" by leaving her station unattended while sweeping despite having been instructed not to do so. (GC Exh. 99.)

Coburn testified that she was dissatisfied with this disciplinary action against her and decided to discuss the issue with Kantner, a top manager with whom she had good relations. As she put it, Kantner had always been "very nice" towards her. (Tr. 1258.) Coburn testified that she did meet with Kantner, but before she could raise the disciplinary issue, he told her that "I heard you guys had a meeting over at the hotel in Stephens City and that just about the whole second shift had been there I also heard that you guys had 65 percent of your union cards signed." (Tr. 1197.) Kantner also noted that Sharon Pence, the discharged former supervisor, had attended this union meeting. Coburn asked him how he received this information and he "said he couldn't tell me who did it." (Tr. 1198.) Coburn then stated that she did not want to talk about this topic, but wished to discuss the discipline issued by Halterman. Kantner promised to look into the matter. About a week later, he told her that "you're probably not going to like what I have to say, but I agree with what J.P. said" (Tr. 1249.)

During this period, management continued to refine its safety policies in accord with the ongoing emphasis on the importance of this issue. In February, top management officials met to consider the development of an unsafe acts policy. Slaughter was tasked with drafting this document. When completed, it was published to all employees at a series of meetings in mid-February. The policy began by announcing that "Interbake considers the safety and wellbeing of our employees to be the most important aspect of our operation." (GC Exh. 17, p. 1.) It went on to define an unsafe act as any "deliberate action that does not follow procedures, policy, or safe

practices." (GC Exh. 17, p. 1.) The policy provided for a written warning for a first offense, an unpaid suspension and final warning for a second such unsafe act, and termination for a third offense. However, the policy made an exception for lock out/tag out violations. It noted that "any failure to properly lock out equipment will result in termination." (GC Exh. 17, p. 1)

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At roughly the same time, management terminated another employee, Christina Duvall, due to a safety issue. Duvall was a machine operator assigned to line 1 on the third shift. On February 14, she was cleaning accumulated dough from around the knives located at the compression rollers. As she explained it, she was "reaching with my left hand down into the machine to grab the dough from inside the machine and pull it out." (Tr. 1667.) She added that "when I pulled my hand back out, I felt something and I dropped the dough, and I looked at my hand, and I had a U-shaped cut on the back of my left index finger." (Tr. 1668.) Duvall did not report the injury, but simply put on a bandaid and returned to work. About an hour later, she bumped the injured spot and, "it really opened up and started bleeding badly." (Tr. 1672.) She was taken for first aid and passed out. An ambulance was summoned and she was transported to the hospital to get stitches.

Duvall's injury was investigated by Gronczewski and Slaughter. They reviewed Duvall's prior safety record as part of this process. Slaughter drafted the resulting termination notice which listed the cause of Duvall's discharge as, "[f]ailure to follow safety procedure." (GC Exh. 15.) The accompanying investigative report explained that "Employee cut her finger on the gauge roller knife while cleaning the equipment. Employee was not wearing gloves while she was cleaning. This is the third laceration that the employee has received due to not wearing gloves. Employee was told many times to wear gloves while cleaning the equipment." (GC Exh. 66.)

Later in February, the Employer discharged a maintenance department employee, Milo Malcomb. This disciplinary action is also alleged to be an instance of unlawful discrimination. The evidence demonstrates that the issue came to the Employer's attention only through the report of a coworker. As revealed in a contemporaneous email from Gronczewski to Slaughter on February 22, a production employee reported that "she saw Milo Malcomb under a conveyor belt near the line 5 dumping station . . . scraping and banging on a roller as it was in motion with a wrench." (GC Exh. 27.)

After an investigation that included interviews with Malcomb and other employees, Slaughter and Maintenance Manager Dan Murray decided to terminate Malcomb's employment. The notice of that termination was drafted by Slaughter and listed the reason as, "failure to lock out equipment." (GC Exh. 29.) In her testimony, Slaughter explained that "[h]e was underneath line 5 conveyor and tapped a roller with a wrench. To do this the equipment would have to be locked out, and he did not have the equipment locked out." (Tr. 231.) She noted that two employees had already suffered injuries while engaged in similar misbehavior.

The General Counsel contends that in addition to firing Malcomb in order to retaliate against him for his union support and to intimidate other union supporters, the Employer used

Malcomb's uniform to send a coercive message to employees. Thus, it was undisputed that Malcomb's uniform was left hanging by the laundry bins for several days. The intent behind this and the meaning to be ascribed to it were the subject of conflicting and ambiguous testimony that will be analyzed at the appropriate point in this decision.

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During February, organizing activity continued apace. The Union conducted a series of meetings for interested employees. At one meeting held on February 26, the attendees were addressed by Sharon Pence, the supervisor who had been discharged for violation of the Employer's fraternization policy due to her relationship with production employee, Cathy Stickley. Pence testified that she told the audience that management had a mental list of union supporters that were being watched and followed. She opined that the employees needed someone to represent their interests.

Stickley also testified regarding Pence's speech. She reported that Pence advised the group that she had been instructed to follow John Robinson and Earl Meyers and to watch Paul and Tina Goode and Bill Keyes. She also reported that she was told to break up any group of employees that were talking and to keep people in their assigned work areas.

Stickley noted that, 2 days after the meeting, she was approached by Operations Manager
Cahill who told her that "he heard that Sharon Pence gave a good speech at the union meeting."
(Tr. 1928.) He then walked away. Stickley's account is corroborated by her contemporaneous notes which indicate that Cahill told her, "I heard Sharon did a good job the other night, while pointing his index finger at me." (R. Exh. 42, p. 3.) In his own testimony, Cahill conceded that he made the remark about Pence's speech, claiming that he had heard about it, "through the rumor mill." (Tr. 3441.)

The next major controversy among these parties arose on March 10. On that date, machine operator Clyde Stovall was assigned to clean certain equipment on line zero. He testified that he was ordered to "start on the incline conveyor and the knife blade and the conveyor belts." (Tr. 927.) As work progressed, Stovall eventually climbed up onto the incline roller located approximately 8 feet above floor level. He was lying on the conveyor cleaning the knife blade. At this juncture, Safety Manager Gronczewski observed Stovall's location atop the conveyor. He testified that "I saw Clyde up there, and I did not see that equipment locked out." (Tr. 445.) He continued by reporting that "I walked around to the opposite side of the equipment. Then I looked at the big gray panel up against the wall. There was no lock out on that. And then I checked the individual lock out point, which is right on the equipment labeled dough feed conveyor, and there was no lock out on there." (Tr. 454).

Both Stovall and Gronczewski agreed that Stovall was immediately ordered to get off the conveyor belt. Gronczewski told him that he was "in big trouble" for failing to lock out the equipment he was cleaning. (Tr. 929.) Based on Gronczewski's report, Slaughter and Schleuss conducted the investigation of the incident. They terminated Stovall on March 12 for the offense of "failure to lock out equipment." (GC Exh. 31.)

Also in mid-March, the Union filed a petition seeking a representation election. This was eventually scheduled for April 16. In the run up to the election, members of management discussed union issues with production employees. For example, on March 13, Supervisor Halterman engaged in such a conversation with Devin Long, a mixer on line 4. Long testified that Halterman asserted that "we would have to give up holidays or they would make our insurance—health insurance rates higher." (Tr. 2512.) In order to make his point, Halterman drew a pie chart and explained that if one slice of the pie became larger, some other slice would have to be reduced in size. He also commented that "if the union were to get in, that you wouldn't be able to change vacation days." (Tr. 2512.)

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In his own testimony, Halterman reported that he passed out campaign literature to Long. In response to questions from Long, he used a pie chart to explain that "they need to stay within their financial boundaries on that. The company doesn't have an unlimited financial boundary." (Tr. 3280.) He reported that he also stated that "[i]t's a matter of give and take and staying within the parameters." (Tr. 3281.) He denied making specific statements about holidays, vacations, or health insurance costs.

On March 14, the Employer discharged John Robinson, an employee who had been in the forefront of the organizing effort at its inception in 2006. The circumstances of this contested discharge are different from the prior disputed disciplinary actions. They do not involve allegations of insubordination, lock out violations, or any pattern of unsafe conduct. Instead, they relate to the Employer's handling of Robinson's history of work-related injuries and the resulting restrictions on his physical abilities.

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Without going into unnecessary background detail at this point in the description of events, suffice it to say that Robinson had experienced work injuries and had been receiving treatment through the workers' compensation system. On March 12, he met with his physician and was found to have reached maximum medical improvement. The doctor classified Robinson as being permanently limited to light-duty work with a lifting restriction of no more than 20 pounds. Two days later, a meeting was held among Robinson, Slaughter, and Schleuss in order to determine Robinson's future job assignment. While the parties dispute some of the details of this discussion, there is little controversy about the eventual outcome.

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It is clear that the participants in the meeting engaged in some conversation about Robinson's medical restrictions and how they would impact his ability to perform a number of production jobs for which he was otherwise qualified. It is also clear that, eventually, Slaughter offered him a position as a SIG operator on the third shift. There is broad agreement that Robinson was able to perform this job and, indeed, had stated that he liked this position. Finally, there is again no disagreement that Robinson objected to an assignment to the third shift. Schleuss testified that his response to this job assignment offer was, "I can do the job, but I will not do the shift. I refuse the shift." (Tr. 2970.) This testimony was corroborated by his notes of the meeting which reflect that Robinson said, "I'm not giving up my 1st shift position." (R. Exh. 71, p. 2.) The notes continue by indicating that Slaughter, "reiterated that the 3rd shift sig operator position is the only open available position that meets his requirements of permanent restrictions and that

declining the position means termination of employment. John stated, 'well I don't want to get fired' but 'I'm not giving up 1st shift.'" (R. Exh. 71, p. 2.) The meeting ended with the decision to terminate Robinson due to his refusal to take the third-shift SIG operator position that was offered to him.

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In late March or early April, there was another controversial conversation about the organizing issue between a supervisor and an employee. In fact, the circumstances of this discussion were most unusual and ultimately produced another major issue in this case. The General Counsel's presentation of the evidence regarding this event proceeded in routine fashion with the testimony of the employee, Melissa Jones. Jones worked as a crunch operator on line 4. She reported that she engaged in a one-on-one conversation with Supervisor Anderson. She contended that, during this discussion, Anderson told her that "if the union came in and we got the [union's] pension, we were not going to be getting two retirement plans. They were going to take our 401(k) away." (Tr. 2153-2154.) She also asserted that Anderson had threatened that the Employer would take us "back to minimum wage" during bargaining. (Tr. 2154.) Under cross-examination, Jones retreated a bit from this claim, indicating that Anderson had stated that "the company could start at minimum wage, and then both sides would bargain from there." (Tr. 2232.) [Counsel for the Employer's words.]

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Under further exploration during cross-examination, it was revealed that Jones had recorded the conversation with Anderson that was being scrutinized at trial. It turned out that Jones had decided to initiate the conversation while armed with a concealed recording device. Thus, she sought Anderson out, activated the recorder, and then directed the conversation toward the topic of collective bargaining. Beyond this, it further developed that Jones had provided the recorder to the Union and that the Union had transcribed the conversation between Jones and Anderson.

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I have had the opportunity to read that transcript and to listen to the actual recording. They clearly demonstrate the vagaries and difficulties that arise when employees and supervisors attempt to parse the technical rules regarding the collective-bargaining process, technicalities that can easily bedevil even experienced labor lawyers and judges. Thus, Jones asks Anderson if the Company is going to take away benefits. Anderson explains, "They're not tak[ing] away your benefits! Everything is on the table, wages, benefits . . . everything." (R. Exh. 43, p. 1.) Later in the conversation, Anderson remarks that the Employer was cognizant that it must engage in, "[f]air bargaining, they have to . . . they have to, they know that." (R. Exh. 43, p. 3.)

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In a reflection of the rambling nature of the conversation which consisted of a groping effort to comprehend the parameters of collective bargaining, Anderson later observes that "you can lose all the benefits. There are all kinds of stuff you can lose and stuff you can gain." (R. Exh. 43, p. 4). In response to a question posed by Jones regarding what Anderson had told other employees, Anderson then makes the remark that has resulted in the unfair labor practice charge arising from this exchange. She states, "[I]f the pension got in here the company's going to stop the $401(k) \dots$ If you got the pension, you can't have two retirements. You can have one or the other you're not going to have two." (R. Exh. 43, p. 4.)

Jones presses forward, telling Anderson that she had heard that Anderson was saying that employees were "going to lose benefits[,] not that they might." (R. Exh. 43, p. 4.) To which Anderson replies, "No, I told them everything was on the table. . . . I told them everything goes to the bargaining table and they could lose this and they could lose that's all I said." (R. Exh. 43, p. 4.) As the conversation progresses, Anderson clearly expresses her frustration that she has been misunderstood. Rather plaintively, she muses that "I said everything is on the table. How do I know what they're going to lose or what they're going to gain?" (R. Exh. 43, p. 5.) Indeed, she adds, "Me, myself if I was on the floor . . . I vote for the union. That's just between me and you "²⁹ (R. Exh. 43, p. 5.)

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The final words spoken during the conversation emphasize the truly unusual nature of what transpired and the oddity of the General Counsel's decision to press forward to trial as to Anderson's remarks. Far from succeeding in any effort to coerce or intimidate Jones, Anderson's ultimate comments indicate clearly that it was she who was intimidated. Thus, she begs Jones to convey to her coworkers, "that's not what . . . that it wasn't meant that way." (R. Exh. 43, p. 6.) She adds that "I'm not going to say anymore about it." (R. Exh. 43, p. 6.) Finally, she pleads with Jones to "[t]ell them I didn't mean anything by it. Tell them I apologize." (R. Exh. 43, p. 6.)

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The General Counsel next alleges that Supervisor Halterman made a series of unlawful comments regarding collective bargaining. These comments were made to employees Agnes Coburn, Janice Reese, and Devin Long. Overall, the evidence in this case reveals that Halterman, more so than any other management official, was willing to discuss the organizing campaign with employees and to press the case for the Employer's stance against the Union. There is no doubt that he followed this course during these conversations.

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In the first such conversation with employees, Halterman reported that he entered the breakroom and observed four employees at a table reading a company handout regarding problems with the Union's pension plan at the Iowa Interbake plant. He testified that he told the employees, "Isn't it a shame, what happened to those people?" (Tr. 3287.) He asserted that it "might not be worth taking a risk" on the Union's pension plan. (Tr. 3287.) At this point, Coburn disputed the accuracy of the handout's information and Halterman walked away.

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Coburn's account of the incident is not hugely different. She reported that Halterman entered the breakroom and observed to the employees that "I hope you guys know that when the Union gets in here, you're going to lose everything." (Tr. 1204.) She challenged him on this point and he replied, "[L]ook what happened to the people in Iowa." (Tr. 1204.) Coburn indicated that the conversation continued with Halterman addressing a coworker known only to

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²⁹ This comment underscores the breach of privacy inherent in Jones' decision to engage in surreptitious recording of what appeared to Anderson to be a private conversation.

her as Gracie. He told her that "if the union gets in here, you can't draw your pension from [a prior employer] plus your BCTGM pension at the same time. It's illegal." (Tr. 1205.)

The General Counsel produced testimony from another employee and union supporter, Janice Reese. It is not entirely clear whether Reese was describing the same remarks from Halterman or a different set of comments made at another time. In any event, she testified that Halterman told employees that "[y]ou're going to lose everything. You know they start at the bottom, and you're going to lose your pay." (Tr. 1580.) Reese reported that she challenged Halterman, observing that the employees were more interested in respect than money.³⁰

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The probative value of Reese's testimony was gravely undermined during cross-examination. As may perhaps be expected from a lay witness, Reese seemed unaware of the importance of precision in describing Halterman's actual statements. Thus, at various times, she asserted that he told employees that they "would" lose money, that they "could" lose everything, and that they "will lose something." (Tr. 1621.) Ultimately, she conceded that Halterman "did not say we would lose everything." (Tr. 1623.) It is impossible to place reliance on her account due to her understandable lack of precision.

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Halterman also testified that, during this period shortly before the election, he distributed a handout regarding pension issues to a mixer named Devin Long. He indicated that Long asked whether they could have both a union pension plan and a 401(k). Halterman reported that he responded that he did not know the answer and that it "depends on what kind of agreement would be reached." (Tr. 3285-3286.)

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Long recalled a far different version of this discussion. He testified that, after distributing a pension handout, Halterman asserted that "if the union wants to get in, that they would get rid of the current 401(k) plan in favor of the union pension plan." (Tr. 2513-2514.)

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The election was held on April 16. In a close vote, 97 employees voted in favor of representation by the Union, 100 voted against such representation, and the ballots of five discharged employees were challenged. As has been recounted earlier, unfair labor practice charges and objections to the Employer's conduct were filed by the Union and the resulting complaint was consolidated with the representation case.

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³⁰ Reese explained that "[t]he benefits and pay's great." (Tr. 1580.) Union activist Melissa Jones made a similar observation during her recorded conversation with Supervisor Anderson. She told Anderson that "I'm not interested in getting more money. I never got paid more on a job than what I'm getting paid right now." (R. Exh. 43, p. 3.)

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E. Events Arising from this Litigation

The trial in this case commenced on October 27, 2008, before Judge Clark. On December 10, Melissa Jones was called by the General Counsel to testify in the case. It will be recalled that her testimony centered on her account of a conversation with Supervisor Anderson during which it was alleged that Anderson made coercive statements to Jones in violation of the Act. During the course of that testimony, it was revealed that Jones had secretly recorded the conversation under scrutiny, using a concealed digital recording machine.

After Jones' testimony concluded, Slaughter was tasked with undertaking an investigation of Jones' conduct in bringing a concealed recording device into the production area and secretly recording a conversation with it. As Slaughter explained, Plant Manager Kantner told her that Jones had made "some recordings within the plant and asked me to investigate." (Tr. 3583.) Slaughter arranged for the presence of a human resources manager from the Company's offices in Richmond, Angela Otto, to attend interviews with Jones and provide assistance during the investigation.³¹

In conducting her investigation, Slaughter interviewed Jones twice with the assistance of Otto. She also reviewed company policies regarding electronic devices and employee misconduct, canvassed the facility to determine what electronic devices were present, and examined the report of an expert in electronic data analysis who had evaluated the data contained on Jones' recording device on behalf of the Employer.

The initial interview with Jones was conducted by Slaughter on February 17. Otto was also present. At that time, Jones told them that she had made three recordings and had never deleted any recordings that she made.³² Two of these recordings were of a so-called line team meeting and a conversation with coworker Jerry Rickard. Of course, the third was of her discussion with Supervisor Anderson.

³¹ The General Counsel finds the presence of Otto, along with Slaughter's use of interview questions drafted by the Company's lawyers, to be suspicious. I certainly do not agree with this jaundiced view of the Company's behavior. Nothing strikes me as more normal than for a litigant who has been subject to lengthy administrative prosecution to proceed with caution when investigating a witness for that prosecution due to misconduct alleged to have occurred in connection with that same prosecution. Similarly, I find it incomprehensible that the General Counsel infers wrongdoing from the use of common investigative techniques such as withholding information from an interview subject in order to test the subject's veracity. It is truly peculiar for an agency charged with ferreting out unlawful conduct to criticize such use of common and entirely legitimate investigative methods.

³² According to the Company's expert, both these statements are incorrect. Having myself listened to the extant recordings made on Jones' machine, it clearly appears that she made more than three such recordings. The expert also opined that there were a variety of erasures of other recordings.

At a second interview later that day, Jones was confronted with the electronic data expert's conclusions for the first time. In particular, she was asked about deletions and about the lengthy recording of a presentation to employees made by Operations Manager Cahill regarding the mechanics of collective bargaining in the event the employees decided in favor of union representation.³³ Unpersuasively, Jones attempted to defend herself by claiming that she may have made accidental deletions and that she "honestly forgot" about the Cahill recording. (Tr. 3815.) During the interviews, Jones readily acknowledged having given the recorder to International Representative Price so that he could transcribe the conversation with Anderson. She reported that he kept the recorder for several days.

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After concluding the interviews, Slaughter and Otto made independent determinations to recommend Jones' discharge. Slaughter prepared the termination report which lists the rationale for the discharge as, "[m]ultiple violations: brought recorder into plant multiple times; recorded business related information multiple times; and shared that information with someone outside the company. Violations of electronic devices policy, employee work conduct policy + serious misconduct policy." (GC Exh. 151.)

With Jones' discharge and the Union's subsequent filing of unfair labor practices related to that discharge, matters involved in this case came to their conclusion.

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F. Legal Analysis

The many allegations of misconduct against this Employer arise under various provisions of Section 8 of the Act. A large number of those charges involve the General Counsel's contention that the Employer engaged in conduct and made statements that intimidated, coerced, and restrained its employees in the exercise of their right to engage in protected concerted activity in violation of Section 8(a)(1). The General Counsel argues that these forms of misconduct also constitute a key foundational element in his further claim that the Employer violated Section 8(a)(1), (3), and (4) by disciplining and discharging several of its employees.

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The Board does hold that violations of Section 8(a)(1) are probative evidence of unlawful antiunion animus that can be used by the General Counsel in meeting his burden of showing that an adverse action against an employee constituted unlawful discrimination. See *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), enf. 519 F.3d 373 (7th Cir. 2008) (trial judge properly found unlawful animus where he determined that employer had made threats and engaged in overbroad application of work rules).

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³³ I have listened to Jones' recording of Cahill's talk. The General Counsel does not contend that Cahill said anything that could run afoul of the Act. I agree. To the extent that the recording sheds any light on the conduct of upper management in this case, it is exculpatory.

Because the adjudication of the asserted Sec. 8(a)(1) violations is material to other key issues in this case, I will begin with an individual assessment of each of those allegations.

1. The alleged 8(a)(1) violations during the 2006 campaign

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The General Counsel contends that the Employer's first violations arose in response to the Union's 2006 organizing activities and consisted of a pattern of surveillance of employees, "in order to pressure them to cease union activities." (GC Exh. 1, par. 7.) Much of the thrust of this allegation comes from the testimony of Sharon Pence, the former supervisor who was discharged for fraternization with a production employee.

On direct examination, Pence reported that management at Interbake became aware of organizing activity in April 2006. During department meetings, supervisors were told to "watch union supporters." (Tr. 2314.) Employees John Robinson, Karl Meyers, Sheila Kniceley, Paul Goode, and Bill Keyes were specifically named. Supervisors were instructed to watch Robinson in order to "make sure he doesn't talk to other people going from his work area to the break room." (Tr. 2315.) They were advised that, if they spotted employees in groups, "to walk over and try to break them up, tell them to move on, to go to break." (Tr. 2316.)

Significant light was shed on the import of Pence's account through her cross-examination. Thus, she agreed that, when managers were told to break up groups of employees, the purpose was, "that we weren't having these huddles of employees, that people were going back to their jobs after break and getting back to work." (Tr. 2355.) [Counsel for Employer's wording.] She also agreed that managers never told the line supervisors to focus on union discussions and ignore groups of employees who were talking about other subjects. Finally, she agreed that there had been an ongoing problem in getting employees to return promptly to their workstations after taking breaks.

Not surprisingly, given Pence's account of the instructions that line supervisors had received, Carol Carter, a union supporter, testified that during this period she saw Pence watching her when she spoke with Robinson. She also reported that Supervisor Brian Johnson had observed her talking to Robinson and approached her to ask what they had been discussing.³⁴

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³⁴ The testimony from the remaining witness who addressed this issue in detail, Tina Shirk, illustrates the caution with which the factfinder must approach many of the witnesses' accounts in this case. The highly charged atmosphere created during the years of controversy has clearly polarized the attitudes of all concerned. Thus, when called to testify by the General Counsel, Shirk denied ever seeing Pence or other supervisors following Robinson. Her affidavit provided to the Board agent long ago said exactly the opposite; including the description of an incident when she was speaking to Robinson and Pence "made a bee line right at us and asked if she could help us." (Tr. 802.) It developed that Shirk had been a union supporter at the time she gave the affidavit. By the time she testified at trial, she reported that "I don't think there's a need for [a union] in our facility." (Tr. 803-804.) She denied that her change of heart had resulted from any sort of threatening or coercive conduct by management. Obviously, it is impossible to place any reliance on Shirk's conflicting accounts.

In my view, the General Counsel's conclusion that the clearly established practice of monitoring of employees' informal meetings on the shop floor was an unlawful response arising from management's opposition to the Union reflects the general difficulty with many portions of the General Counsel's prosecution in this case. Thus, it is based on a single-minded and blinkered view of the events. Seen only through the prism of an unalterable conclusion that management was determined to thwart the Union by breaking the law, Pence's corroborated account of observation and disruption of employees' discussions appears to show improper and unlawful conduct. The problem with such a narrow focus is that it fails to accord reasonable deference to management's legitimate need to supervise its work force and promote production of the Company's products.

As the Board stated long ago, "[t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours." Peyton Packing Co., 49 NLRB 828, 843 (1943), enf. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944), quoted with approval by the Supreme Court in Republic Aviation v. NLRB, 324 U.S. 793, 803 (1945). In Republic Aviation, the Court went on to articulate the key problem at issue here, noting the Board's duty to harmonize "the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments . . . [The] opportunity to organize and proper discipline are both essential elements of a balanced society." 324 U.S. at 797-798.

As will shortly be discussed in detail, management observed employees talking to each other on worktime and received reports from other employees who stated that they had been subjected to solicitations from union supporters on worktime. I conclude that the so-called surveillance of union supporters was directed toward the legitimate effort to enforce the entirely reasonable prohibition on use of worktime for nonwork purposes.

The gravamen of the alleged offense here is that the Employer attempted to coerce and intimidate employees by watching their behavior and breaking up their discussions. The crux of the analytical issue is whether "under the circumstances, the employee[s] reasonably could conclude . . . that [their] protected activities are being monitored. *Sam's Club*, 342 NLRB 620,

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³⁵ Of course, to be lawful, such a work rule cannot have been adopted for a discriminatory purpose. See *Weyerhaeuser Co.*, 359 NLRB No. 138 (2013). I find no evidence of such a purpose here. As Pence explained, management never told supervisors to enforce the rule disparately against conversations about the Union. It is true that supervisors did pay attention to the activities of union supporters, such as Robinson. This is entirely logical as it was those union supporters, intent on making their case, that were using worktime to engage in nonwork activities. There is simply no evidence that employees were engaged in the same misconduct in order to sell cosmetics or gamble on athletic events, etc.

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620 (2004) [Citations omitted]. In this regard, "[t]he Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not do something out of the ordinary." *Eddylean Chocolate Co.*, 301 NLRB 887, 888 (1991) [Internal punctuation omitted]. The Board has also explained that "[i]ndicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005), rev. denied 515 F.3d 942 (9th Cir. 2008).

Applying these standards, I find that the General Counsel has failed to meet his burden of proving that a reasonable employee would have been coerced, restrained, or intimidated in the exercise of protected rights. The evidence, including instances of imposition of discipline for solicitation on worktime, reveals that the surveillance in question was targeted at unprotected conduct consisting of the solicitation of employees conducted on working time. Working people everywhere understand that an employer may reasonably monitor their conduct on the work floor to ensure that they are engaging in work, as opposed to wasting time on nonwork related conversations. The Employer's surveillance of employees to enforce its requirement that they refrain from solicitations on working time did not violate Section 8(a)(1).³⁶

The General Counsel next alleges that, in April 2006, Supervisor Maria Markham told employees that management knew of their union activities and did not like them due to their involvement in those activities. It is alleged that Markham specifically mentioned that Production Manager Larry Tomasiello did not like Robinson and that Robinson had a black mark on his head. These comments are alleged to constitute the unlawful creation of an impression of surveillance of employees' protected activities. (GC Exh. 1(j), pars. 5(a) and (b).)³⁷

³⁶ In another persistent theme throughout this lengthy case, I would note that I grasp the General Counsel's concern that the surveillance and enforcement efforts that arose from that surveillance could serve to gratify the Employer's desire to oppose the Union. While this may well be true, it is not determinative of any law violation. So long as the predominant purpose of the surveillance was the legitimate enforcement of discipline in the workplace, any incidental gratification of antiunion sentiment is immaterial.

statements as simply constituting impression of surveillance violations. It is clear that telling a union supporter that a top manager doesn't like him due to his union activity and that he bears a black mark on his head as a result would properly be characterized as the utterance of an unlawful, albeit indirect, threat designed to coerce the employee and interfere with his exercise of protected rights. See *Leather Center*, *Inc.*, 308 NLRB 16, 23 (1992) ("veiled threat of possible repercussions" from prounion activity violates Sec. 8(a)(1)). While the Board certainly requires notice of allegations consistent with due process, the extent of this protection in administrative proceedings is "flexible," depending on the circumstances presented. *Sunshine Piping, Inc.*, 351 NLRB 1371, 1378 (2007). Here, the overall theory pled was a violation of Sec. 8(a)(1). The parties had a full and fair opportunity to litigate the facts asserted to have constituted the violation of that statutory provision. In order to effectuate the remedial purposes of the

Although the complaint allegations refer to "employees" in the plural, testimony in support of that allegation related only to Robinson. He reported that Markham had approached him and, in a private conversation, had stated, "[W]e know you're the one leading the union, and that I now have a black mark on my head, and Larry Tomasiello does not like me." (Tr. 655.)

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The Employer failed to present any evidence to dispute Robinson's account. I do note that Markham had left the Company's employ as of April 27, 2006. In light of this, the failure to produce her as a witness does not give rise to an adverse inference. Nevertheless, the fact remains that Robinson's testimony about these statements by Markham is uncontroverted. While I note that Robinson is a highly interested partisan witness, his account of these remarks in sufficiently credible to be given weight in the absence of any contradictory evidence. As will be explained later, the totality of the evidence presented in this case does demonstrate that the Employer bore some degree of animus against him arising from his leadership role in the organizing activity. As a result, I conclude that Markham made the statement at issue.

When a supervisor tells an employee that he has a "black mark" against him due to his union support, the Employer has engaged in threatening and intimidating behavior in violation of Section 8(a)(1). See, for example, *Hialeah Hospital*, 343 NLRB 391 (2004) (supervisor telling employee that he felt "betrayed" by prounion activity constituted an implicit threat of unspecified reprisals). The more difficult question is whether, as alleged by the General Counsel, Markham created an unlawful impression of surveillance when she advised Robinson that the Employer knew that he was the leader of the organizing effort.

The standard for assessment of an impression of surveillance offense has been summarized by the Board as requiring that the General Counsel carry "the burden of proving that the employees would reasonably assume from the statement in question that their union activities had been placed under surveillance." *Heartshare Human Services of New York, Inc.*, 339 NLRB 842, 844 (2003). Here, this is a very difficult challenge to meet considering that there was clear evidence that Robinson chose to engage in frequent union organizing activities at the facility, even on working time. These open activities were constantly under the observation of managers who were conducting their supervisory duties.

As the Board has explained, when the organizing activities discussed by management "are overt such that employees would not reasonably conclude that the employer learned of them through surveillance, the Board has found no violation." *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1296 (2009). Because Robinson conducted his organizing activity in

Act, I find it necessary and proper to adjudicate the alleged violation as a threat rather than as an impression of surveillance violation. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf. 920 F.2d 130 (2d Cir. 1990) (Board may find violation in the absence of specific complaint allegation if the conduct is closely related to a complaint allegation and issue was fully litigated).

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an open manner in the workplace, he could not have reasonably concluded that Markham had gained knowledge of this activity through improper surveillance or spying. The General Counsel has failed to meet his burden in this regard. However, by telling Robinson that Tomasiello disliked him due to his union activism and that he bore a black mark over his head as a result of such activities, Markham coerced and intimidated Robinson in violation of Section 8(a)(1).

It is next contended that the Employer, through statements made by Chuck Prestinari and John Sampson, interrogated and threatened employees due to their involvement in protected activities. (GC Exh. 1(j), pars. 11(a), (b), (c), and 12.) Once again, although the charges are framed as having been committed against more than one individual, the only person who testified about them was Tina Shirk. Shirk reported that Prestinari and Sampson had been sent from the Elizabeth, New Jersey plant to assist the new Front Royal operation on a temporary basis.³⁸

When asked by the counsel for the General Counsel to testify regarding alleged unlawful statements made by these men, Shirk repeated her pattern of denying any misconduct by company officials. Thus, she insisted that Prestinari never discussed the Union with her. She described their relationship as friendly. She did note that Prestinari saw her talking to Robinson and asked her about it. Prestinari cautioned her to be "careful" about talking to him, but she explained that they merely discussed family and church. (Tr. 774.) She insisted that she did not feel coerced by Prestinari's conversations regarding her contact with Robinson. Similarly, Shirk reported that Sampson never discussed the Union with her.

As with other aspects of Shirk's accounts in this case, counsel for the General Counsel pointed out troubling inconsistencies between her testimony and her prior statements by affidavit. In her affidavit, she had asserted that both Prestinari and Sampson had asked her pointed questions about the Union and had warned her regarding any support for the Union.

³⁸ The parties dispute the legal status of the two men. Shirk testified that she did not regard the men as supervisors at Front Royal and there is no evidence they engaged in supervisory activities while on temporary assignment there. The General Counsel contends, however, that they were held out by the Employer as its agents at Front Royal. The Board's test is "whether the alleged agent's position and duties, and the context in which the conduct occurs, establish that employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Suburban Electrical Engineers/Contractors, Inc.*, 351 NLRB 1, 3 (2007) [Internal punctuation and citations omitted.] Prestinari and Sampson were admitted supervisors in New Jersey. As explained in a contemporaneous company memo, they were sent to Front Royal to get the inventory control procedures "taught and established." (GC Exh. 132, p. 2.) While the assigned function of teaching is not necessarily indicative of a broader authorization, the task of establishing the Employer's processes is a clear indicator of agency status. See *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998) (agency found where employees were tasked to "implement company policies on the production floor"). I conclude that the two men were agents of the Employer while at Front Royal.

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On balance, I find that Shirk's testimony, which is unsupported by any other reliable evidence, is too slender a reed to rely on in constructing a case of unfair labor practices. As I previously observed, Shirk's accounts were consistent in only one key aspect. They were always tailored to fit whatever her current view of the need for a union happened to be. They simply cannot meet the General Counsel's burden in proving any law violations. As the Board has wisely observed, even uncontradicted testimony from an incredible witness is not probative. *Jupiter Medical Center Pavilion*, 346 NLRB 650, 652 (2006).

The General Counsel's next asserted violation of Section 8(a)(1) by the Employer involved a conversation between Supervisor Pence and Robinson. During that conversation, it is alleged that Pence threatened Robinson with discharge due to his union activities. (GC Exh. 1(j), par. 6.)

Robinson testified that in June, "maybe," he had a one-on-one confrontation with Pence. At the time he was wearing a bump cap with union stickers pasted on it. (Tr. 663.) He reported that she told him "she had just gotten out of a meeting with the other supervisors and that I had better watch what I was doing or I'll end up losing my job." (Tr. 663.) Pence agreed that she and Robinson had a confrontation. She indicated that her records reflected that it happened on May 20, 2006. She reported that she saw Robinson wearing the bump cap with union stickers and asked him, "John, what is that on your hat?" (Tr. 2318.) He told her, "[D]on't go there." (Tr. 2318.) She said this was the end of the discussion.

Once again, I must evaluate statements by partisan witnesses. The statements in question do bolster each other by referring to the same conversation that appears to have been prompted by Robinson's union stickers. While Pence's account is more innocuous, I attribute this to her natural desire to cast her behavior in a gentler light. Given that both witnesses confirm that there was some inappropriate allusion to Robinson's union activities, I conclude that his account is entitled to weight in this circumstance and that it is sufficient to establish the violation alleged.

It is also alleged that, on May 19, 2006, Sanitation Manager Ken Heishman removed union literature from the employees' breakroom. (GC Exh. 1(j), par. 9(a).) Support for this allegation was presented through the testimony of a current employee, Shawnee Burcker. She testified that she entered the breakroom on this date and saw Heishman seated at a table. She explained that "there was union literature laying on it, and he had it in his hand and he was reading it, and then he picked up the remaining pieces of literature on the table and carried them out of the room." (Tr. 2438.) She indicated that she had never seen Heishman remove anything from the breakroom before this event.

On cross, Burcker elaborated, noting that Heishman took two or three pieces of union literature. He did not take anything else out of the room. After he left, she did not see any other pieces of union literature still in the breakroom. Finally, her testimony as to this event was corroborated by her contemporaneous note stating that she had seen Heishman, "removing union literature from the break room" on May 19. (GC Exh. 114.)

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Although Burcker was a somewhat partisan informant, her testimony was consistent and, to a degree, corroborated. It was not contradicted by any account from Heishman and I find it credible. It demonstrated that Heishman read the literature before removing it. He chose to remove all the Union's literature and he did not remove anything else. Instead of discarding the literature in a trash receptacle, he took it with him as he left the breakroom. All of this leads to the conclusion that he was not simply tidying up the breakroom but was attempting to thwart the Union's effort to communicate with employees through literature left in the breakroom for them to read.

It is clear that the deliberate and selective removal of union literature from a nonwork area is an unfair labor practice within the meaning of the Act. As the Sixth Circuit put it, "[i]f it is a non-work area and the union literature is dispersed during non-working time, the employer may not stop the distribution." *Meijer, Inc. v. NLRB*, 463 F.3d 534, 542 (2006). The D.C. Circuit has explained, "an employer's selective removal of pro-union pamphlets conveys the unmistakable message of hostility toward unionization." *Mid-Mountain Foods, Inc. v. NLRB*, 269 F.3d 1075, 1077 (D.C. Cir. 2001). I find that Heisman's actions on this date violated Section 8(a)(1).

On June 6, the Union held a rather dramatic event in the course of its organizing campaign for 2006. It engaged in handbilling of employees as they drove their vehicles into the plant's entrance. This drew the attention of Plant Manager Bullock. The General Counsel alleges that Bullock's response to this event was to engage in two unfair labor practices, calling the police to curtail the handbilling and engaging in surveillance of employees who were giving and receiving handbills. (GC Exh. 1(j), pars. 8(a) and (b).)

The evidence shows that the Union engaged in morning and afternoon handbilling. During the course of both the morning and afternoon handbilling, the local police were summoned to the scene. The General Counsel has submitted the reports that they prepared in each instance. Unfortunately, these reports were redacted by the police department to remove the names of specific individuals whom they characterized as complainants. Nevertheless, it is clear from the totality of those reports that a key person involved in seeking their intervention against the handbillers was General Manager Bullock. Thus, the morning report states that "[c]omp[lainant] adv[ised] there are approx 5 subjs at the end of the road soliciting. *She* adv[ised] they are union people and *she* wants to know what they can do." (GC Exh. 84, p. 4.) [Emphasis added.] Regarding the afternoon police report, it notes that the officers spoke with the "General Manager of Interbake." (GC Exh. 84, p. 7.) I conclude that the female individual was indeed the general manager, Denise Bullock.

Various union supporters and officials were present during the afternoon episode, including Robinson and Oskoian. William Keyes testified that he drove into work at approximately 2 p.m. As he did so, he saw Plant Manager Bullock standing by the guardhouse. He reported that she waved to him as he drove in. Robinson also testified that he watched Bullock's behavior at the guardhouse. He said, "[S]he would stop and ask [employees] for the literature back or, you know, whether they gave it to her or not. Some did, some didn't." (Tr. 676.) Oskoian also described Bullock's behavior. He noted that she spoke to some employees as they drove in and

that he overheard one conversation. He testified that Bullock told that employee, "I'm sorry you have to go through something like this." (Tr. 520.)

It should be noted that neither Bullock nor any other company official was called to testify regarding the Employer's conduct during the handbilling. While Bullock left the Company's employ in 2007, there was no explanation for the failure to produce any security personnel or other witnesses. In any event, my conclusion that the General Counsel clearly met his burden of establishing the violations regarding the handbilling activity is based on the impressive corroboration provided by photos taken during the event and by the police reports prepared by the officers who responded to that event. The General Counsel introduced three photographs of Bullock's activities while she stood watch at the guardhouse. (GC Exhs. 81-83.) In particular, General Counsel's Exhibit 83 shows obvious surveillance activity by Bullock. As to Bullock's involvement in summoning the police, their report indicates that they conferred with security personnel and a female "General Manager of Interbake." (GC Exh. 84, p. 7.)

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Having found that Bullock summoned the police and engaged in close surveillance of handbillers and employees during this event, I must determine whether such actions violated the Act. It is obvious that summoning the police would have the effect of restraining otherwise protected activity. Nevertheless, the Board acknowledges that there can be legitimate reasons that support the propriety of seeking police intervention. Thus, in *Nations Rent, Inc.*, 342 NLRB 179 (2004), the employer was not found to have violated the Act when it called for police assistance where pickets had trespassed on company property and were following employees home. As the Board explained, "[i]t is well established that an employer may seek to have police take action against pickets where the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests." 342 NLRB at 181.

In this case, the Company provided absolutely no justification for the decision to summon the police. There is no evidence that, at the time the police were called, the handbillers were engaged in any unlawful activity or that they threatened any interference with the Employer's lawful interests. In such circumstances, the Board has held that, "[i]n the absence of any showing by the Respondent that it was motivated by reasonable concerns when it called the police on the above days, and in the absence of any evidence indicating the need for a police presence, we find that the Respondent's actions violated Section 8(a)(1)." *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191-1192 (2007). I reach the same result here.

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As to Bullock's surveillance of the handbilling activity, the overall principle was articulated by the judge in *Kenworth Trucking Co.*, 327 NLRB 497, 501 (1999), who noted that "[i]n general where, as here, employees are conducting protected activities openly, open observation of such activities by an employer is not unlawful. However, if the observation goes beyond casual and becomes unduly intrusive, a violation occurs." [Footnotes omitted.]

I conclude that Bullock's behavior was certainly unduly intrusive. In the first place, there was no evidence that it was in any way routine for the plant's highest official to station herself at the guard shack. Secondly, as revealed in the compelling photos, she placed herself in a spot

where her presence conveyed a clear statement that she was watching the behavior of employees as they experienced and reacted to the handbilling. This was underscored by the testimony that she attempted to demand that employees give her the handbills that they had accepted from the Union's supporters. Finally, her attitude of displeasure was revealed by her comment that she was sorry that employees had been subjected to the Union's handbilling activity. All of this went far beyond the activity of the nursing home administrator in *Sprain Brook Manor Nursing Home*, supra, who was found to have violated the Act when she drove to the facility and stood by the exit door for the sole purpose of observing protected activities. I conclude that Bullock engaged in unlawful surveillance of the handbilling on June 6 in order to interfere with and restrain employees from engaging in protected activities.

Chronologically, the next allegation is that the Employer implemented a new work rule that provided for unattended employee materials in nonwork areas to be discarded. It is asserted that this rule was promulgated in direct response to the organizing campaign. (GC Exh. 1(j), par. 10.) There can be no dispute as to the basic fact. On June 12, 2006, the Company posted a document it titled, "Reminder of Interbake's Solicitation/Distribution Policy." (GC Exh. 4.) It was signed by Plant Manager Bullock.

While the Employer seeks to style this document as a mere "reminder" of existing solicitation and distribution policies, examination of the appropriate documents demonstrates that this is false. The existing company handbook does contain a solicitation and distribution policy. However, its provisions regarding distribution of materials in nonwork areas are substantially different from the policy articulated in the so-called "reminder" of June 12. Indeed, the differences go to the heart of the General Counsel's contention.

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In the handbook's policy, the entire provision regarding the matter at issue is a single sentence which states, "Employees may distribute material only in non-work areas, and only during non-work time." (GC Exh. 3A, p. 37.)³⁹ In sharp contrast, the reminder memorandum restates the quoted language and then proceeds to go far beyond it. It provides that, "[e]ven in non-work areas, the Company strives to maintain a neat, orderly, and safe environment and, therefore, promptly discards any materials left unattended in these non-work areas. Accordingly, any employees who leave unattended distributed materials in non-working areas risk having those items discarded." (GC Exh. 4.)

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I agree with counsel for the General Counsel's argument that the practice of posting new rules during an organizing campaign that provide for removal of written materials from

³⁹ GC Exh. 3A is the Employer's original handbook. HR Manager Slaughter testified that as of July 1, 2006, a revised version replaced it and remained in effect throughout the period at issue in this case. That edition is GC Exh. 3B. Since the reminder document under scrutiny was issued prior to the effective date of the revision, it is GC Exh. 3A that is involved in the analysis of this allegation. In any event, as to the issue here, the two versions are the same. See GC Exh. 3B, p. 36.

nonworking areas constitutes a violation of Section 8(a)(1) as found in *Delchamps, Inc.*, 330 NLRB 1310, 1325 (2000). The timing of such a procedure sends an obvious and pointed message to the work force about the Employer's hostility to the organizing activity and serves to coerce and restrain the employees' protected activity.

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In analyzing the import of the Employer's reminder notice, I observe that it does contain a significant ambiguity. Read in the most benign light, it could merely be providing that it applies only to such "unattended distributed materials" as have been left behind by employees who had finished reading them. If this had been clearly expressed, it could arguably represent a legitimate effort to keep the workplace clean, an important consideration in a food manufacturing plant. However, it is equally possible to read the language in a far more restrictive light as applying to any "unattended distributed materials," including those left in a neat pile for employees to pick up and read. It is this interpretation that clearly runs afoul of the law.

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The Board has long held that it is only fair to construe ambiguities against the drafter of the work rule in question. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enf. 203 F.3d 52 (D.C. Cir. 1999). Because it is easy to interpret the reminder's terms as implementing a new policy of discarding unattended materials, including union literature, even if that literature had been neatly placed in the breakroom to permit access to it by off-duty employees, the issuance of the reminder was unlawful.

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In light of the Employer's issuance of this unlawful work rule, it is clearly understandable that the General Counsel has scrutinized management's behavior involving the discarding of union literature in the breakroom. Thus, the General Counsel contends that HR Manager Joanne Snyder unlawfully removed such literature from the breakroom in September 2006. (GC Exh. 1(j), par. 9(b).) The evidence as to this issue consisted of testimony from Earl Meyers, a forklift driver and active union supporter.

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On the occasion at issue, Meyers was eating his lunch in the lunchroom. Also present was Michael Teeg, a sanitation department employee who was performing his job by "wandering around, cleaning up the room a little bit." (Tr. 2260.) Snyder entered the room and began reading materials that had been present in the room. These included both "handbills" and "the newspaper." (Tr. 2260.) Subsequently, she placed some handbills and newspapers in the trash receptacle and departed. Significantly, Meyers conceded that Snyder discarded both union and company handbills and that other union and company handbills remained after she departed. Finally, he agreed that the Company worked diligently to keep the plant clean due to the requirements of a food production operation and also due to the visits by various inspectors.

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⁴⁰ Colorfully, the Second Circuit endorsed the Board's policy resolving ambiguity against the employer who drafted a work rule by observing that "the employees of respondent are not grammarians." *NLRB v. Miller*, 341 F.2d 870, 874 (1965).

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While I grasp the General Counsel's concern, I cannot find any impropriety here. Snyder's actions were neutral in their impact and appear to me to be entirely consistent with a desire to assist Teeg in his legitimate sanitation duties. In evaluating this and other related controversies in the case, I remain mindful of the plant's nature as a food producer. Both the Employer and society as a whole have significant interests in maintaining the entire facility as a neat and clean environment so as to assure the wholesomeness and safety of the Company's products. See *Consolidated Biscuit Co.*, 346 NLRB 1175, 1176 (2006), enf. 301 Fed. Appx. 411 (6th Cir. 2008) (Board declines to "second-guess" employer's judgment regarding a food safety issue). I conclude here that a reasonable employee would perceive Snyder's actions as directed toward cleanliness and not as an attempt to intimidate or restrain protected activities.

A second instance of the General Counsel's concern regarding management's removal of union literature occurred in the following month, October 2006. It is alleged that Assistant HR Manager Slaughter unlawfully removed union literature from the employees' locker room. (GC Exh. 1(j), par. 9(c).) The testimony regarding this event was provided by Carol Carter, a robot operator and active union supporter.

Carter testified that she was in the locker room conversing with a sanitation department employee named Wanda. Slaughter "came into the area and picked up the union flier that was laying on the bench" in the locker room. (Tr. 1784.) She took it with her as she left the room. Once again, I comprehend the General Counsel's anxiety arising from the Employer's unlawful issuance of the reminder notice. However, I can find nothing suspicious about Slaughter's conduct. It is apparent that the single leaflet had been left on a bench in the locker room. It was entirely reasonable for Slaughter to assume that it was abandoned and should be discarded in the interest of maintaining a clean and neat locker room for the employees. Once again, I conclude that a reasonable employee would not interpret Slaughter's actions as designed to retrain or coerce union activity but rather as an effort to dispose of litter. As a result, Slaughter's actions did not violate Section 8(a)(1).⁴¹

To summarize my conclusions thus far, I have found that the General Counsel has met his burden of proving that, during the 2006 organizing campaign, the Employer committed unfair labor practices consisting of the utterance of threats, the removal of union literature from the breakroom, the surveillance of handbilling activity, the summoning of police in order to disrupt protected activities, and the unlawful implementation of a work rule authorizing the discarding of unattended materials. I have also concluded that the evidence presented failed to establish a variety of other alleged law violations.

⁴¹ If I were to somehow conclude that Slaughter's discarding of a lone leaflet left on a locker room bench constituted a law violation, I would decline to impose any remedial measure. The Board recognizes the venerable legal maxim that, de minimus non curat lex. *Yellow Ambulance Service*, 342 NLRB 804, 810 (2004) (even assuming unlawful motivation, "a Board remedy for de minimus misconduct is unwarranted").

2. Alleged violations of Section 8(a)(3) during the 2006 campaign

It is now necessary to turn to the General Counsel's allegations that the Employer engaged in unlawful discrimination against its employees by issuing two written warnings to Robinson, assigning him to the grinding room, and issuing him a final written warning. In addition, it is alleged that the Employer engaged in similar unlawful discrimination by issuing a written warning to Keyes. The Employer denies any such unlawful discrimination and contends that each action was motivated by legitimate reasons unrelated to protected union activity.

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I will now analyze these issues. Because so much of this case turns on the proper analysis of the Employer's motivation in taking various personnel actions against employees, it is worthwhile to outline some of the key considerations that have been identified and articulated by the Board and its reviewing authorities.

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As to each of the contested personnel actions, the critical issue is the need to divine and parse the Employer's motives. Because the evidence establishes that a number of motivating factors were present, the analytical test to be applied is the Board's so-called "dual motive" standard enunciated in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and subsequently approved by the Supreme Court in *NLRB v*. *Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

Recently, the Board has summarized the established test for dual motive analysis as follows:

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Under *Wright Line*, the Acting General Counsel satisfies his initial burden by showing that (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer bore animus towards the employee's union activity. If the Acting General Counsel meets his initial burden, the employer may defend by proving that it would have taken the adverse action even absent the employee's union activity. [Citation omitted.]

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Encino Hospital Medical Center, 359 NLRB No. 78, slip op. at 1 (2013).

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In applying this test to the many and varied factual situations presented in labor law cases, the Board has guided factfinders by propounding ancillary principles to shape the analysis. For example, the Board has approved cautionary language from the Third Circuit which observed that the Act "does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate for an employee's concerted activities." *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969), cert. denied 397 U.S. 935 (1970), cited with approval in *North Carolina Prisoner Legal Services*, 351 NLRB 464, 469, fn. 17 (2007). Beyond this, the Board has warned that "a judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken [cannot be] a substitute for evidence that the employer would have relied on this reason alone." *Ingramo Enterprise*, 351 NLRB

1337, 1338, fn. 10 (2007), rev. denied 310 Fed. Appx. 452 (2d Cir. 2009). [Citations and internal punctuation omitted.]

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On the other hand, the Board has made it clear that the essence of a dual motive analysis is to permit the possibility that an employer harbored unlawful animus and still demonstrated that it would have discharged the employee regardless of that animus. *Arlington Hotel Co.*, 278 NLRB 26, 26 (1986) (complaint dismissed where employee's union activity was a reason for her discharge, but employer proved that it would have discharged her "in the absence of such protected activity"). Furthermore, the Board has acknowledged that "[a]n employer has the right to determine when discipline is warranted and in what form The Board's role is only to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts." *Cast-Matic Corp.*, 350 NLRB 1349, 1358-1359 (2007). Put more plainly, the Board has cited with approval language from the Fifth Circuit explaining that it "has no authority to sit in judgment on managerial decisions" including whether such decisions were "reasonable or unreasonable, too harsh or too lenient." *NLRB v. Florida Steel Corp.*, 586 F.2d 436, 444-445 (5th Cir. 1978), cited in *Neptco, Inc.*, 346 NLRB 18, 20, fn. 16 (2005).

With these considerations in mind, I will now address the General Counsel's claims that the Employer engaged in unlawful discrimination against union supporters during the 2006 organizing campaign. The first such complaint arises from the Employer's issuance of a written warning to Robinson on May 11, 2006. It is argued that this disciplinary action violated Section 8(a)(3). (GC Exh. 1(j), par. 19.)

Production Manager Tomasiello did issue a written warning to Robinson on May 11. By its terms, it was issued for the infraction of "carrying on very lengthy conversations when you should have been working." (GC Exh. 88.) Startlingly, Robinson appended a handwritten comment at the bottom of the notice. He stated, "Not enough work to keep me busy!" (GC Exh. 88.) [Punctuation in the original.]

Turning to the *Wright Line* format, Robinson was a prominent union supporter and activist and management was well aware of his leadership role in the organizing effort. Indeed, it will be recalled that less than a month earlier, Supervisor Markham had warned him that he had angered Tomasiello and that he bore a black mark against himself due to this union activity. This threat is clearly sufficient to also meet the General Counsel's burden of showing unlawful animus against Robinson. As a result, the burden shifts to the Employer to demonstrate that Robinson would have been disciplined regardless of his involvement with the Union.

In the first place, I readily conclude that Robinson's comment on the disciplinary report constitutes his admission that he had been engaged in lengthy discussions with coworkers while on worktime. The General Counsel asserts that the Employer was not concerned with Robinson's wasting of company time, but was actually angered by the topic that he was discussing, i.e., the Union. I grasp the reason for the General Counsel's suspicion. However, as the Board has noted, "mere suspicion cannot substitute for proof of an unfair labor practice." *Lasell Junior College*, 230 NLRB 1076, 1076, fn. 1 (1977).

The fact remains unalterable that Robinson engaged in lengthy conversations with coworkers on worktime. Thus, he deprived his employer of the services of himself and those fellow employees. It is elementary that this constitutes a universally recognized and serious workplace offense. I have already noted the Board's admonition that "[w]orking time is for work," and its holding that an employer may lawfully prohibit union solicitation during work time. See *Peyton Packing Co.*, 49 NLRB 828, 843 (1943). While the decision to discipline him for this obvious workplace misconduct may have served to gratify the Employer's animus against his union involvement, I have no difficulty in finding that the predominant motivation for the issuance of this written warning was the Employer's legitimate desire to halt Robinson's misuse of his own worktime and that of his coworkers. In taking this disciplinary action, the Employer was merely enforcing the prohibitions contained in its employee handbook. As a result, I conclude that the Employer has met its burden as to this alleged offense and has proven that it would have disciplined Robinson regardless of his protected activities.

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The General Counsel next asserts that Robinson was subject to discriminatory treatment when he was issued a second written disciplinary notice on June 13, 2006. (GC Exh. 1(j), par. 19.) That notice, another written warning, was issued by HR Manager Underwood and referred to one specific incident and also a more generalized complaint as to Robinson's behavior. The specific incident involved his being outside his work area while engaged in a ten-minute conversation on working time with a coworker, Connie Gardner. The broader issue was that "written complaints were made by two employees that you have approached them several times while they have been working, soliciting them."⁴⁴ (GC Exh. 89.)

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⁴² The General Counsel argues that the failure to impose similar discipline on those employees demonstrates unlawful motivation. I cannot agree. It strikes me as entirely logical that an employer would choose to discipline the individual who was making a practice of buttonholing other employees who may or may not have been willing participants in his lengthy conversations.

⁴³ The handbook's solicitation and distribution rule provides, in pertinent part, "Interbake respects the right of its employees to express and share their beliefs, ideas and opinions among each other. Such communications, however, should never interfere with our production or process or interfere with our ability to fill our customers['] orders. Therefore, solicitation by employees on company property is prohibited when the person being solicited is on working time. Working time is the time employees are expected to be performing their job duties; it does not include break periods, lunch periods, or time before and after work." (GC Exh. 3(a), p. 36.) The General Counsel agrees that this policy is lawful on its face. (See Tr.. 77, 79.)

⁴⁴ Supervisor Brian Johnson participated in this discipline along with Underwood. Robinson testified that Johnson explained the basis of the write up as being that "I was talking too long to the other employees out on the floor, and I was being written up for not doing my job." (Tr. 682.)

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The General Counsel's theory as to this allegation is perplexing in that it seems to ignore the basic principle underlying the *Wright Line* "dual motive" analysis. Thus, at trial and in the posttrial brief, counsel for the General Counsel advised that there is no contention that the portion of the discipline relating to the coworkers' complaints of unwelcome worktime solicitations was unlawful. (See Tr. 685-686; GC Br. at p. 15, fn. 18 and p. 119.) It is only contended that the portion of the discipline relating to the conversation between Robinson and Gardner was illegally discriminatory. In appearing to agree that the discipline was motivated in very substantial part by legitimate reasons, the General Counsel is largely conceding that the Employer can meet its burden under *Wright Line* by showing that it would have issued the warning to Robinson due to the complaints of solicitation on working time made by fellow employees. Nevertheless, I will make my own analysis of the issue.

As to his conversation with Gardner, Robinson's testimony was troubling. He claimed that their discussion was confined to a work issue regarding plastic liners and that it was "brief" and lasted "[a] minute." (Tr. 686.) Gardner's disciplinary report for the same infraction stated that Gardner had conceded that she and Robinson "also discussed personal things" during the conversation. (GC Exh. 38.) Given Robinson's prior history of admitted instances of identical misconduct, I credit Gardner's admission and find Robinson's testimony to be incredible.

I conclude that, identically to the earlier written warning for the same offense, Robinson was disciplined with the predominant motive of curbing his persistent habit of misusing his own working time and the working time of others. In assessing the sincerity of the Employer's motivation in this regard, I also note the impressive restraint shown in declining to increase the severity of the sanction for a second warning arising from an identical type of misconduct, particularly where that warning related to multiple new offenses. Because the Employer's predominant rationale for issuing this warning to Robinson was entirely genuine and legitimate, I find that it has met its burden under *Wright Line* by establishing that it would have disciplined Robinson regardless of his involvement in protected union activities.

Chronologically, the next allegation of unlawful discrimination concerns the issuance of a written warning to William Keyes on June 15, 2006. (GC Exh. 1(j), par. 19.) The warning was issued by HR Manager Underwood for Keyes' violation of the Employer's solicitation and distribution policy. The write up noted that complaints had been received from another employee, indicating that Keyes had solicited that employee on several occasions "in the production area during work." (GC Exh. 80.)

In his testimony, Keyes agreed that he had engaged in multiple attempts to solicit union support from a coworker, Maria Alvarez. He contended that most of these conversations were in

⁴⁵ Another peculiarity here is that Gardner was also issued discipline arising out of the same incident. (See GC Exh. 38.) There is no claim that the discipline issued to her for the same misconduct was discriminatory or pretextual.

nonwork areas of the facility such as the breakroom and smoking area. However, he conceded that, during the first week of June, he initiated another conversation about the Union with Alvarez on the production floor in an area "where they had stored different parts of machinery to be assembled." (Tr. 626.) Under cross-examination, Keyes reported that he did not know if Alvarez was on break during this conversation on the floor. He also testified that he "assum[ed] she was going back to her work station." (Tr. 634.) On redirect, Keyes again noted that any belief on his part regarding Alvarez' status at the time he solicited her, "would have to be an assumption on my part." (Tr. 641.)

The General Counsel first argues that this issue should be resolved by applying the Supreme Court's holding in *Burnup & Sims*, 379 U.S. 21 (1964). In that case, employees were disciplined due to the wording of their solicitations to coworkers to join a union. The Court upheld the Board's conclusion that the solicitations had been protected conduct and that the Act prohibited the employer from sanctioning such protected activity. In the present case, the issue is not what Keyes said to Alvarez. It is clear from the terms of Underwood's write up that the complaint against Keyes was that he engaged in solicitation in a working area and on worktime. Given Keyes' own concessions in his testimony, I find that he had engaged in the misconduct alleged by Underwood, who was acting reasonably by relying on Alvarez' reports to her. Because Keyes was soliciting on worktime and in a work area, his conduct was unprotected under the Act. See *Peyton Packing Co.*, supra. In consequence, the holding in *Burnup & Sims* does not apply.

The General Counsel correctly argues that a *Wright Line* analysis should also be conducted regarding Keyes' discipline. Keyes testified to a variety of open union activities commencing in May 2006. These included handing out literature and wearing union insignia. He reported that his activities were observed by supervisors. Clearly, management was aware of significant organizing activity by Keyes, not least due to the content of Alvarez' complaints about that activity. Regarding animus, I have found that prior to Keyes' discipline, Markham and Pence made threats against union supporters, Bullock engaged in unlawful surveillance and disruption of protected activities, and the Employer issued an unlawful work rule regarding written materials in nonwork areas. All of this is sufficient to prove animus, particularly those unfair labor practices that were directed toward solicitation and distribution activity, such as the handbilling.

As the General Counsel has met his initial burden, I must evaluate the sincerity of the Employer's stated rationale. The General Counsel argues that the timing of the discipline, just weeks after Keyes began his open union activities, supports an unlawful motivation. The problem with this argument is that it ignores the identical relationship between the timing of the discipline and Alvarez' reports to management regarding Keyes' misconduct. In these circumstances, the Board has held that "the factor of timing is too weak a foundation upon which to base a finding of pretext." *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 675 (2004). Indeed, the fact that the discipline was initiated by complaints from a coworker supports its legitimacy. One can readily comprehend the Employer's desire to respond appropriately to complaints that an employee's attempts to work were being disrupted by a coworker.

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On balance, I find that this is very much a dual motive situation. I do not doubt that the Employer may have been gratified to receive Alvarez' complaints and happy to respond to them in the manner that it did. Nevertheless, the reasonableness of that response, coupled with the genuine nature of the problem involving the violation of the basic principle that an employee's working time and the working time of his coworkers may not be misused in the manner chosen by Keyes, lead me to conclude that the Employer has met its burden with regard to the issuance of the written warning to Keyes. The predominant motivation for this action was Keyes' abuse of worktime. The discipline issued to him would have been identical had his solicitations been for a vote on behalf of a political candidate or a bet on a football game.

The next allegation of discrimination again focuses on Robinson. The General Counsel argues that Robinson was given an assignment to work in the grinding room in order to retaliate against him for his union activities and in order to prevent him from more easily engaging in those activities. (GC Exh. 1(j), par. 19.) In support of this contention, the General Counsel produced several witnesses. Robinson testified that, on June 19, he was performing his duties as a forklift driver. He recalled engaging in a dispute with an employee of the firm that repaired the Company's forklifts. Approximately 30 minutes after this dispute, Supervisor Johnson told him, "I was not supposed to drive a forklift anymore at all in the plant, to get off the forklift immediately, and my new job would be in the grinding room." (Tr. 688.)

Robinson reported that the grinding room assignment was unpleasant duty as the room was hot and humid and the work consisted of shoveling. The grinding room was also isolated from the rest of the work force. This stood in sharp contrast to his forklift job where he travelled throughout the plant and came into regular contact with many employees. He remained in the grinding room assignment for roughly 6 weeks. He was then transferred to the mixing room.

On cross-examination, Robinson provided significant context for his reassignment. He conceded that his reassignment coincided with the transfer of other Interbake employees to the grinding room on other shifts. Interestingly, he also conceded that nobody was assigned to replace him on the forklift job.

Two other witnesses testified to the circumstances involved in Robinson's reassignment. Janice Reese reported that she worked on forklifts with Robinson. At the same time he was assigned to the grinding room, she was transferred to mixing. She stated that Supervisor Henline told her that she was reassigned "so it wouldn't look obvious because they . . . didn't want it to be known that they moved [Robinson]." (Tr. 1626.) On redirect examination, she elaborated,

⁴⁶ The timing of the reassignment so shortly after the dispute with the repair company's employee begs the question as to whether Robinson's behavior on that morning contributed to his reassignment. The parties did not explore this issue and I decline to engage in further speculation about it.

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explaining that Henline told her, "[W]e don't want them to think that we're moving John because of union activities." (Tr. 1631.)

Former Supervisor Pence testified that Schleuss had given the order for Robinson's transfer. He told her that Robinson was placed in the grinding room "to confine him more to one area where he would be isolated." (Tr. 2323.) She added that Schleuss indicated that other employees would be transferred to the grinding room as well so that it would not look like Robinson was reassigned "for being in the union." (Tr. 2324.)

10 On cross-examination, Pence made two key concessions. First, she confirmed that the Company was struggling to get up to speed and that the inexperienced work force was generating unusually large quantities of waste product. As a result, the large amount of work involved in grinding that waste required the Employer to start rotating employees through the grinding room to cope with the workload.⁴⁷ Second, she confirmed the clearly established nature of the problem involving Robinson's engaging in solicitation conversations on working time. She agreed that there was a legitimate concern to "get him back and continue working." (Tr. 2346.) [Counsel for the Employer's wording.]

While Robinson's temporary transfer was not a result of a disciplinary proceeding and 20 did not affect his pay or benefits, the General Counsel argues that it was unlawful discrimination against him because it was motivated by a desire to isolate him, retaliate against him, and interfere with his ability to engage in organizing activities. As a matter of law, the General Counsel is correct in noting that such conduct would violate Section 8(a)(3). See, for example, American Red Cross Missouri-Illinois Blood Services Region, 347 NLRB 347, 348 (2006), and 25 Briar Crest Nursing Home, 333 NLRB 935, 943 (2001) (reassigning employees in order to isolate them so as to interfere with their protected activities violates the Act).

As always in such cases, the question is the precise nature of an employer's motivation as assessed through the Wright Line methodology. As with each adverse action taken against Robinson, the General Counsel has met his initial burden and the focus must be on the Company's explanation for its behavior.

I do not disagree with the General Counsel's view that the transfer of Robinson to the grinding room was motivated in significant degree by the desire to punish him for organizing activities and to isolate him from coworkers so that he would not continue to engage in his practices in this regard. However, the General Counsel glosses over the critical distinction that must be drawn. The real issue here is whether the action against Robinson was motivated by his

⁴⁷ The large volume of available work in the grinding room stood in sharp contrast to Robinson's own description of the lack of available work in his forklift assignment. It will be recalled that Robinson had written to his Employer that there was "[n]ot enough work to keep me busy!" (GC Exh. 88.) [Punctuation in the original.]

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protected activities or his unprotected activities on behalf of the Union. I readily conclude that it was his persistent practice of soliciting coworkers while both he and they were on the work floor and on the Company's time that led to the decision to place him in an assignment that would isolate him from the opportunity to engage in additional misconduct of this nature. To be clear, I also find that the grinding room assignment was a product of genuine production-related considerations and was meted out to other employees on other shifts. As to the day shift, I conclude that Robinson was selected for the assignment partly as a means to curb his misconduct and this decision was not, to any significant degree, the result of any animus against his protected union activity. Once again, I conclude that the Employer would have transferred Robinson to an isolated assignment in order to curb his improper solicitations if those solicitations had been for magazine subscriptions or charitable contributions.

In reaching this conclusion, I have been given some pause by the testimony that managers attempted to conceal the rationale for Robinson's transfer because they were concerned to avoid the appearance of retaliation against union activities. On reflection, I do not think this proves a law violation. I find it reasonable that management would be concerned that employees would fail to perceive the subtle distinction between protected and unprotected union activity and would regard the Employer's action as unfair.⁴⁸ If one were to adopt the General Counsel's dark and critical view of the Company's intent in this case, one would have to be surprised that management was concerned about "covering up" Robinson's transfer. If the Employer sought to use the transfer as an opportunity to coerce or restrain protected activity, it would hardly have been worried about creating a perception that it was being unfair to Robinson because of his protected activities.

The Employer has met its burden of proving that it did not discriminate against Robinson because of any protected activity by him. Indeed, the reasonableness of management's concern about his pattern of unprotected activity is highlighted by the uncontested facts involving the next alleged unfair labor practice. There can be no question that Robinson was an incorrigible violator of the Employer's common sense and universally-recognized prohibition against solicitation on working time.

I am referring here to the General Counsel's final allegation of unlawful discrimination during the 2006 organizing campaign. It is contended that the issuance of a final written warning to Robinson on September 20, 2006, violated Section 8(a)(3). (GC Exh. 1(j), par. 19.) On that date, HR Manager Underwood did issue a "Team Member Final Written Warning" to Robinson. (GC Exh. 90.) The document explained that it arose from, "a written complaint made by an employee that you approached this employee in the work area, soliciting this employee with a paper." (GC Exh. 90.) In her conversation with Robinson, Underwood elaborated, telling him that "I had given a union paper to one of the employees on the floor, and he was complaining about it." (Tr. 696.)

⁴⁸ Indeed, his coworkers did tease Robinson, calling him a "convict." (Tr. 689.)

In assessing this alleged unfair labor practice, it is critical to note the General Counsel's precise legal theory. To explain, I will quote from his posttrial brief:

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While counsel for the General Counsel does not contend that the September 20, 2006 final written warning was substantively unlawful, counsel for the General Counsel contends that because Robinson's May 11 and June 13, 2006 written disciplines were the subject of unfair labor practice charges Robinson's September 20, 2006 final written warning should have been a counseling or a written warning per the first step in Respondent's progressive disciplinary policy.

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(GC Br. at pp. 124-125. See also Tr. 81-82 to the same effect.)

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I have no quarrel with the General Counsel's legal theory. As the Board has explained, "[i]t is well settled that, where a respondent disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful." Hays Corp., 334 NLRB 48, 50 (2001), quoted in Publix Super Markets, Inc., 347 NLRB 1434, 1441 (2006). Of course, the difficulty here is that I have concluded that the May 11 and June 13 disciplinary actions were lawful and legitimate responses to Robinson's ongoing unprotected activities. In responding to the most recent instance of his pattern of misbehavior by issuing a final written warning, the Employer was entitled to rely on those prior disciplinary actions in applying its progressive disciplinary procedures to Robinson's case. The Employer did not violate the Act in this regard.⁴⁹

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The General Counsel does not allege the commission of any additional unfair labor practices until the very end of 2007, the period in which union activity resumed as a prelude to the 2008 representation election.

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3. Alleged 8(a)(1) violations during the 2007-2008 campaign

Robinson reported that, as of late 2007, organizing activity "started heating up again." (Tr. 746.) In December, he was disciplined for insubordination. 50 After that, he decided to take

⁴⁹ While the General Counsel concedes the propriety of the Employer's decision to discipline Robinson for this offense, in the interest of decisional completeness, I will observe that, had it been necessary to evaluate the Employer's action under Wright Line, I would not have hesitated to find that the Employer met its burden of proving that its motivation was to make yet another effort to deter Robinson's stark pattern of misuse of company time. Indeed, the measured and reasonable nature of the Employer's disciplinary responses to Robinson's ingrained attitude of defiance of its solicitation policy casts considerable doubt on the General Counsel's overall belief that this Employer was motivated by unlawful animus in its disciplinary treatment of employees who supported the Union.

⁵⁰(See R. Exh. 10.) There is no claim that this discipline, which was for conduct by Robinson which was described as "loud, sarcastic and defiant," was improper or unlawful. (R. Exh. 10.)

"more of a backseat" in the organizing campaign. (Tr. 746.) He indicated that the more active employees in the renewed effort were Phillip Underwood, Sheila Kniceley, Earl Meyers, Connie Nelson, and a married couple, Paul and Tina Goode.

As with the 2006 campaign, the General Counsel alleges that the Employer engaged in a broad variety of unlawful conduct in response to the employees' organizing activity in 2007-2008. Much of this consisted of alleged violations of Section 8(a)(1). However, it is also alleged that the Employer escalated what the General Counsel deemed to be unlawful discrimination, culminating in the discharges of six employees during the campaign in violation of Section 8(a)(3). As before, it is appropriate to first examine the alleged 8(a)(1) offenses because, if established, they provide a foundational element for analysis of the 8(a)(3) claims.

The first such allegation is that, in December 2007, Supervisor Halterman uttered a threat that employees could be discharged for expressing support for the Union. (GC Exh. 1(j), par. 13(a).) Three witnesses provided testimony about this incident. Of them, two were clearly highly partisan: Milo Malcomb, an alleged discriminatee, and J.P. Halterman, the supervisor whose conduct was being scrutinized. I have assessed their accounts with appropriate caution. The third witness was current employee and union supporter, Ruth Peterson.

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Malcomb testified that he was walking in the hallway at the facility in the company of a coworker named Ruth.⁵¹ Halterman was in the hallway, "talking to some employees there, and I heard him say, you could be fired for talking about the union." (Tr. 1348.) Malcomb asked his coworker if she had heard the comment and she replied, "[N]o, don't pay no attention to what he says; he's just an asshole." (Tr. 1348.) Malcomb indicated that, at the time Halterman made this statement, he was 3 to 4 feet away from him.

In his own testimony, Halterman denied ever engaging in a conversation about firing employees due to their union activities. He also denied ever having a conversation in the place described by Malcomb at any time when Malcomb and Peterson were present.

This leaves the testimony of Peterson to be considered. She confirmed Malcomb's account to the extent that she described the two of them walking past Halterman. She heard Halterman, "say something about firing people." (Tr. 2078.) She further confirmed that she told Malcomb, "[D]on't pay any attention to him. He's an ass." (Tr. 2079.) However, as to the key point, the threat of firing people for union activity, Peterson demurred. She testified that all she heard was the word, "firing." She added, "[n]o, I don't know exactly what he was talking about." (Tr. 2115.)

⁵¹ I infer that the coworker was not a close associate of Malcomb's because he testified that he was unsure of her last name. He indicated it could have been Patterson or Peterson.

As with all alleged violations of Section 8(a)(1), the General Counsel bears the burden of proof. See *Blue Flash Express*, 109 NLRB 591, 591-592 (1954) (the General Counsel has burden of proving unlawful threats by preponderance of the evidence). Regarding any legal issues, I agree with the General Counsel's theories. If Halterman made the statement reported by Malcomb, it was an obvious threat of the most severe type. The fact that it was not spoken directly to Malcomb, but merely overheard by him, would not alter the result. See *Perko's Inc.*, 236 NLRB 884, 884, fn. 2 (1978).

The difficulty here for the General Counsel is not the law, but the facts. Malcomb and Halterman's accounts are essentially a wash. Peterson did not corroborate the key assertion, that Halterman's reference to firing of employees was connected to their union activity. In such circumstances, the party bearing the burden of proof has failed to carry that burden. See *American, Inc.*, 342 NLRB 768 (2004) (party with burden loses where judge found "no basis for choosing the testimony of one witness over the other").

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The General Counsel next alleges that, on December 14, 2007, the Employer promulgated an overly broad no-solicitation rule through statements made by Maintenance Manager Dan Murray. It is alleged that those statements instructed employees that they were prohibited from talking about the Union while on the line. (GC Exh. 1(j), par. 14(a).) Once again, the key prosecution witness was Malcomb. In this instance, however, his testimony was substantially corroborated by Supervisor Murray's own account.

Malcomb testified that he was present in the shop on the morning in question, along with coworkers Mike Helminski and Kevin Grapes. Murray addressed the three men as follows, "I see that the union's going to start their shit up again. I really don't want you all voting for the union, and I don't want you out there on the line talking to the employees about the union. Just talk to them about work." (Tr. 1351.)

In his own account, Murray denied telling the employees that they could not talk about the Union with coworkers. However, he admitted that he did tell the men to "pay attention to their jobs, which we have to turn the plant around, and try not to get involved in the politics." (Tr. 3164-3165.)

Unlike the preceding issue, here I have no difficulty accepting the General Counsel's view of the facts. Instead, I must struggle with his legal theory. As to those facts, I find Murray's own formulation of his remarks as amounting to something very close to an admission of the accuracy of Malcomb's report. It is likely that Murray's reference to his discouragement of discussions of "politics" is a reference to workplace politics, i.e., the organizing campaign. There is nothing in the record to indicate some other meaning and it is unlikely that there was some electoral activity in the region just 2 weeks before Christmas. I conclude that when Murray testified to warning employees to avoid discussing "politics," he was confirming Malcomb's claim that he told his men to refrain from discussions about the Union.

My difficulty here is the legal framework offered by the General Counsel. It seems a long stretch to contend that the maintenance manager's comments to three of his people constituted the promulgation by the Employer of an overbroad work rule. Interestingly, the Board has very recently discussed this problem, observing that it "has not articulated a specific standard defining when an oral statement by a supervisor constitutes a rule." *Flamingo Las Vegas Operating Co., LLC,* 359 NLRB No. 98, slip op. at 2 (2013). As here, in *Flamingo* the supervisor's instruction to an employee was unaccompanied by any evidence that other supervisors, or management in general, endorsed the remarks. The Board declined to find that the supervisor's statement rose to the level of a work rule. In a footnote, the Board observed that, in appropriate circumstances, a comment such as that made by Murray could result in the finding of a violation "regardless of whether those instructions take the form of a threat or a work rule." 359 NLRB No. 98, slip op. at 2, fn. 4. See also *Weyerhaeuser Co.,* 359 NLRB No. 138, slip op. at 2 (2013), citing *Colburn Electric,* 334 NLRB 532, 551-552 (2001), enf. 54 Fed. Appx. 793 (5th Cir. 2002).

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While I disagree with the exact manner in which the General Counsel has framed the issue, I do fully concur in his assertion that Murray's remarks were unlawful. In my view, while they did not amount to the promulgation of some sort of formal work policy or rule, they were a direct threat which served to restrain, coerce, and interfere with the protected activities of the three employees. Because the General Counsel's allegation did cite to the correct subsection of the Act and the parties litigated the issue thoroughly, I conclude that it is appropriate to find that the Employer violated Section 8(a)(1) when Murray uttered his threat against discussions of the organizing campaign. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf. 920 F.2d 130 (2d Cir. 1990).

As with the preceding complaint allegation, the General Counsel next contends that the Employer again promulgated an overly broad no-solicitation rule when a supervisor allegedly told an employee to refrain from speaking with union supporters while on the work floor. (GC Exh. 1(j), par. 14(b).) As discussed immediately above, I have indicated that I do not agree with the General Counsel's legal theory regarding treatment of such allegations as involving the promulgation of a work rule. Nevertheless, I again find it appropriate to evaluate the alleged unfair labor practice as a statement which interfered with, restrained, and coerced employees in the exercise of protected rights.

Turning to the facts, the allegation is based entirely on the testimony of former employee and union supporter, Cathy Stickley. Stickley testified that, in January 2008, she was working on line 2 when Supervisor Kathy Madigan told her, "[N]ot to be talking to Tina Goode because of her union activities." (Tr. 1912.) Stickley continued her account by reporting that on the following day, she was assisting Goode with a work issue. Madigan "reminded me a second time not to be around Tina Goode because of her activities." (Tr. 1913.)

On cross-examination, the issue became cloudier. Stickley conceded that Madigan had an ongoing concern that Stickley was unable to complete her assigned work tasks as a forklift operator. As a result, Madigan did not want Stickley to get off her forklift to help other employees. Indeed, she agreed that when Madigan told her not to help Goode, she never

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mentioned the Union. Later on, Stickley returned to her assertion that "the reason [Madigan] did not want me talking to Tina and stopping was because she's a union supporter and it looked bad. I needed to not be associated with these people." (Tr. 1971.) I note that while this represents an attempt by Stickley to return to her assertion that Madigan's intention was to interfere with conversations about the Union, it nevertheless includes a reference to Madigan's objection to Stickley's "stopping" her work activity in the manner that had concededly caused Madigan's legitimate concern about her productivity. (Tr. 1971.)

Apart from being both contradictory and entirely uncorroborated, Stickley's account was flatly denied by Madigan in her own testimony. She contended that she never discussed the Union with Stickley.

Given Stickley's highly partisan position in this litigation,⁵² her contradictory and uncorroborated account is too slender a reed to support the General Counsel's burden of proof as to the alleged violation under any legal theory. It is as likely that the incidents she described merely represented Madigan's efforts to divert Stickley from interaction with Goode in order to get her to return to her duties as forklift operator. On this record, I cannot find that Madigan instructed Stickley to refrain from interaction with Goode because of Goode's union support.

The next unfair labor practice asserted by the General Counsel is an alleged unlawful interrogation of Stickley by Operations Manager Cahill. (GC Exh. 1(j), par. 15(a).) As before, the sole witness offered in support was Stickley. She reported that she had a habit of going outside to smoke a cigarette after her shift. Often, she would encounter Cahill in the smoking area doing the same thing. They would discuss various things, including production issues.

Stickley said that, on one occasion in January, during her shift she had a conversation with Robinson regarding the weather. Cahill observed this. Later, in the smoking area, he raised the topic with her. She testified that Cahill, "[A]sked me what I was talking to John about and then kind of blew it off to say never mind, I don't want to know." (Tr. 1910.) She then took a paper out of her pocket containing production tracking information in order to offer it to Cahill. She reported that Cahill "made the comment if that was a union card." (Tr. 1910.)

In his testimony, Cahill noted that he and Stickley had enjoyed a "very good working relationship" during the period under examination. (Tr. 3434.) As to her description of his alleged questions on the smoking deck, he opined that "I don't think it happened." (Tr. 3436.)

⁵² In addition to being a union supporter, Stickley also had separate reasons to testify adversely to her Employer's interests. It will be recalled that her friend, Supervisor Pence, had been discharged for maintaining an improperly close relationship with Stickley. Additionally, Stickley reported that she, herself, was fired by the Employer in March 2008.

I have already indicated my strong concern with Stickley's motives and interests in this matter. Although she reported that other employees heard Cahill's question about her conversation with Robinson, she was unable to recall their names. Nobody corroborated her account and Cahill disputed it. Once again, I do not find Stickley's unsupported assertions sufficiently reliable to carry the General Counsel's burden.⁵³

The General Counsel next alleges three instances of supposed unlawful intimidation of union supporters by Supervisor Anderson. In the first one, she is alleged to have told employees that they ought not to let other people hear them talking about the Union. (GC Exh. 1(j), par. 16(a).) The second one concerns an allegation that she told an employee, Phillip Underwood, that he should watch out, because he was going to get himself into trouble. (GC Exh. 1(j), par. 16(b)(i).) Finally, it is claimed that, in the outdoor smoking area, Anderson told employees that supervisors were looking to get rid of Underwood and that, one way or another, he was going to be discharged. (GC Exh. 1(j), par. 16(b)(ii).)

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As to the first incident, the sole witness was an alleged discriminatee in this case, Malcomb. He testified that, in January 2008, he and an employee of the contractor who supplied temporary workers to the facility were summoned by Supervisor Anderson to shovel cookies that had spilled onto the floor. Malcomb reported that this temporary worker stated that if there were a union in the shop, Malcomb would not have to perform this type of task. Malcomb replied that he was "probably right." (Tr. 1353.) Malcomb claims that, at this point, Anderson told the men, "[I]f I was you all, I wouldn't let anyone hear me talking about the union." (Tr. 1353.)

Under cross-examination, substantial doubt was created when Malcomb was required to
describe the circumstances of this supposed encounter. He testified that Anderson was 4 to 6
feet away from the two men when they spoke about the union issue. They were all in a very loud
area of the plant. Beyond this, he agreed with the assumption that Anderson would likely have
been wearing ear protection. As to Anderson, she testified that she never instructed Malcomb, a
maintenance repairman, to clean up a cookie spill. She also flatly denied making the statement
Malcomb alleges.

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⁵³ If I were to credit her account, I would find that the "interrogation" she described was not unlawful as it would not have restrained or coerced a reasonable employee in the circumstances. As the Board explained in its leading case on the topic, "[t]o hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. . . . If section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution." *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). I think the situation as described by Stickley represents an instance of playful banter that would not have seemed coercive to a "worker of normal backbone," as the Seventh Circuit once put it. *NLRB v. Acme Die Casting Corp.*, 728 F.2d 959, 963 (1984) (supervisor's casual question asked in a friendly manner and not followed up was not unlawful).

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Beyond the fact that this is another instance of an allegation based entirely on the uncorroborated and somewhat contradictory testimony of a highly interested party, I have another analytical factor to consider that is not often available in the circumstances of this case. Early in this decision, I noted that my status as a replacement for Judge Clark renders me incapable of factoring demeanor into my determinations. However, evaluation of Anderson's demeanor is possible in this matter, thanks to the surreptitious recording of her candid participation in a fairly lengthy conversation with Melissa Jones regarding the organizing campaign at issue here. I have listened to this recording and note that it is of excellent quality. I found Anderson's demeanor as expressed in her tone and inflection as well as the thoroughgoing candor of the content of her speech to be very impressive. Far from an agent of intimidation against union supporters, she struck me as respectful of those supporters and even secretly in their corner. I credit her denial and reject Malcomb's account as the product of his partisanship.

As to the other two instances alleged against Anderson, the evidence proffered was thin to nonexistent. It is noteworthy that the General Counsel's brief contains a short discussion of the alleged cookie spill incident involving Malcomb but is silent as to the two alleged threats by Anderson involving Underwood. (GC Br., at pp. 145-146.) In her own testimony, Anderson flatly denied making either statement. Beyond this, she was positive that she would not have made any statements on the smoking deck in January because she suffers from emphysema and would not go outside in winter due to her inability to tolerate cold air in her lungs. I credit Anderson's testimony as to these allegations. It is consistent with my appraisal of her demeanor and attitude and clearly outweighs the slight-to-nonexistent evidence offered in contradiction.⁵⁴

The General Counsel's attention next shifts to General Manager Nick Kantner. It is alleged that, in February 2008, Kantner created an unlawful impression of surveillance of employees' union activities by making statements to an employee regarding events that had transpired during a union meeting. (GC Exh. 1(j), par. 17.)

Only one witness provided testimony as to this issue, Agnes Coburn. Although Coburn was a partisan witness, I found her testimony on this point to be nuanced, balanced, and detailed. Although Kantner continued to be employed as plant manager, his testimony was not offered. Given my conclusions as to the probative value of Coburn's uncontroverted account, I find that her testimony about this event is credible.

⁵⁴ As I will discuss in detail at the appropriate point in this decision, to the extent the resolution of these claims involves credibility determinations arising from the adversarial relationship between Anderson and Underwood, I find that Anderson was the reliable witness and Underwood was simply not credible.

⁵⁵ As will be discussed later in this decision, I found Coburn's testimony as to other matters to be problematic, particularly those where she had a direct and personal interest. As Judge Learned Hand observed in a labor case long ago, "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witnesses' testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

Coburn indicated that she and Kantner had a good relationship and that he had always been "very nice" to her. (Tr. 3258.) They had discussed the Union at various times and he had explained that "he knew how I felt about the union and that it was okay for him and I to agree to disagree about the union." (Tr. 1196-1197.) The event under scrutiny occurred when Coburn had a meeting with Kantner to discuss a complaint that she had against her supervisor.

Coburn reported that, before she could raise the matter that she wished to discuss, Kantner told her that "I heard you guys had a meeting over at the hotel in Stephens City and that just about the whole second shift had been there but a few people I also heard that you guys had 65 percent of your union cards signed." (Tr. 1197.) He also asserted that Former Supervisor Pence had attended this meeting.

Coburn testified that she was struck by the level of detail in Kantner's statement because the union representative at the meeting had told the attendees that "we had 65 percent of our cards signed." (Tr. 1197-1198.) This prompted Coburn to ask Kantner how he had gotten his information. Kantner replied that "he couldn't tell me who did it." (Tr. 1198.) With that, Coburn changed the subject, telling Kantner that she did not want to talk about the meeting any further but wished to discuss her issue regarding her supervisor.

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The Board prohibits an employer from creating an impression of surveillance of protected activities because "employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activity, and in what particular ways." *Flexsteel Industries*, 311 NLRB 257 (1993). Specifically, the Board finds such violations when managers tell employees that they know what transpired at union meetings. See *Spartech Corp.*, 344 NLRB 576 (2005) (telling employee that supervisor knew who attended union meeting), and *United Charter Service*, 306 NLRB 150 (1992) (supervisor told employees about "specific details they discussed" in union meetings).

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Kantner compounded the coercive impact of his statements by declining to identify his source of knowledge. *Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB 1294, 1296 (2009) (failure to identify source of information about union meeting is the "gravamen" of impression of surveillance violation). I conclude that the General Counsel has met his burden of establishing Kantner's impression of surveillance violation.

In the next allegation, the General Counsel contends that a different supervisor, Mark Cahill, committed the same sort of impression of surveillance offense on February 28, 2008. It is alleged that Cahill did so by telling Stickley that he had heard what had happened at a union meeting. (GC Exh. 1(j), par. 15(b).)

Stickley reported that Cahill spoke to her a few days after the same union meeting which had been described by Kantner. It will be recalled that this was the meeting at which Former Supervisor Pence spoke to the attendees. Stickley testified that Cahill told her, "[H]e heard that

Sharon Pence gave a good speech at the union meeting" and then walked away. (Tr. 1928.) Cahill confirmed Stickley's account, testifying that he had told Stickley that Pence had done a real good job at the union meeting. Disingenuously, he reported that he had learned about Pence's speech "through the rumor mill." (Tr. 3441.)

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There is no factual dispute here. The coercive impact of Cahill's statement is clear as it constitutes precisely the sort of interference with employees' protected activities that goes to the heart of the impression of surveillance violation. Based on the authorities cited in the preceding paragraphs regarding Kantner's similar misconduct, I find that Cahill's conduct violated Section 8(a)(1).

The General Counsel next contends that the Employer violated Section 8(a)(1) through certain conduct that did not involve any actual statement, either oral or written. The predicate to this allegation is the undisputed fact that maintenance employee Milo Malcomb was discharged by the Employer on February 27, 2008. The General Counsel theorizes that Malcomb was fired for his union activities and sympathies. The Employer counters that it terminated Malcomb through neutral application of its zero tolerance policy for lock out/tag out violations, a policy which it concluded that Malcomb had violated. As will be discussed in detail at the appropriate point in this decision, I have determined that the predominant motivation for Malcomb's discharge was, in fact, his lock out/tag out violation and that he would have been discharged for that misconduct regardless of any participation in the organizing campaign. My finding in this respect obviously undermines the General Counsel's subsequent claim that the Employer displayed Malcomb's uniform as a means to intimidate his coworkers by sending a message that union supporters risked discharge. Nevertheless, it is necessary to proceed with a complete analysis of this contention because, in applying the *Wright Line* standards, I did find that antiunion animus was present in the circumstances of Malcomb's termination to some degree.

The General Counsel presented testimony from four supporters of the Union regarding this issue. Melanie Johnson reported that, after Malcomb was fired, she saw his uniform bearing his name tag and, "it was hanging on the left-hand side on the dirty laundry bins . . . and that was unusual because I had never seen a uniform hanging there before." (Tr. 1508.) Under cross-examination, Johnson conceded that there were several uniforms hanging on the dirty laundry hamper at the same time.

Janice Reese also reported seeing Malcomb's uniform hung in a place where she had never before observed a uniform hanging. She indicated that uniforms were hung in this room, but never in that precise location.

Alleged discriminatee Clyde Stovall testified that the Company hung up Malcomb's uniform after his discharge "so that you could see it when you walked into the only entrance we could use." (Tr. 944.) Stovall reported that he decided to move the uniform and put it with the dirty clothing. Halterman observed this and told him to "leave that there." (Tr. 945.)

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Malcomb, himself, testified that he did wear a uniform and that dirty uniforms were placed in a hamper for cleaning. If a uniform became damaged, he explained that you put a tag on it, and "hang them on a coat hanger and put them on the locker." (Tr. 1409.)

The Employer presented Halterman's testimony that he never told Stovall to leave Malcomb's uniform hanging where it was.⁵⁶ More significantly, the Company presented the testimony of Kandace Lancaster, the administrative employee who is in charge of uniforms. She explained that the Employer hired a contractor to clean and repair its uniforms. They picked up soiled or damaged uniforms on Tuesdays. When asked what is done regarding the uniforms of terminated employees, she explained that "I fill out the form, basically putting a stop on their uniforms, and the following Tuesday I will give that information to [the contractor], and they will remove the uniform from their locker." (Tr. 3122.) Lancaster testified that this procedure was followed regarding Malcomb's uniforms which were picked up on the Tuesday after she filled out the necessary notice form. In corroboration, the Employer introduced the contractor's logbook showing a stop on Malcomb's uniforms, dated February 28, the day after he was discharged. (R. Exh. 90.)

The Board has explained that "[a]n employer violates Section 8(a)(1) if its conduct would tend to coerce a reasonable employee. In determining whether an employer's [behavior] violates Section 8(a)(1), the Board considers the totality of the relevant circumstances." *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003). [Citations and internal punctuation omitted.] It is important to note that the purpose of this objective standard is to avoid the fallacy of interpreting an employer's conduct only through the eyes of committed, highly partisan union supporters or equally partisan union opponents. Instead, such conduct must be examined by attempting to perceive how the proverbial reasonable employee would react.

Much of the evidence regarding the placement of Malcomb's uniforms is vague. While it appears that the uniforms may have been hung in a place slightly apart from the ordinary, it also plainly appears that they were hung in the room designated for this purpose. Furthermore, it appears that the Employer followed its established process for disposal of the uniforms of terminated employees by its contractor.

While the Employer's actual motive is not a dispositive element of the analysis, I find it material in the unique circumstances of this claim which does not involve any actual speech.⁵⁷ In

⁵⁶ As to the conflict between Stovall's testimony and Halterman's, I place reliance on neither. They were both highly partisan players in the dramas involved in this case and their testimony can only be given weight when it is corroborated by other reliable evidence. Here, there is no such corroboration.

⁵⁷ I grasp that, in the case of statements, the Board "does not consider the motivation behind the remark." *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). Given the inherent ambiguities in the circumstances alleged here, I think this complete prohibition would not apply. See *Westwood Health Care Center*, 330 NLRB 935, 940, fn. 17 (2000) (Board declines to make "mechanical" application of this objective standard and requires "full context" to be considered).

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that regard, the predominant motive for Malcomb's termination was his lock out violation, not any union support.⁵⁸ This renders it unlikely that management would have considered the display of Malcomb's uniforms to be effective in communicating an antiunion message. Furthermore, if the Employer had actually discharged Malcomb as part of an effort to illegally thwart the union's campaign, it hardly seems likely that it would feel the need to further advertize this fact. Indeed, the act of firing an employee for his or her union sympathies would be a far more powerful message to the work force than the ambiguities involved in the hanging of that employee's uniform somewhere in the locker room.

Examining the totality of the circumstances as to this issue, I conclude that the General Counsel had not met his burden of proving a violation. It is at least as likely that the location of Malcomb's uniform in a slightly different spot in the locker room was the product of pure happenstance as opposed to nefarious, albeit entirely silent and opaque, messaging. In my view, to the extent it would have drawn any attention at all, a reasonable employee would not have found the hanging of Malcomb's uniform in the locker room to convey a message of intimidation or restraint.

The next allegation is that, on March 4, 2008, Halterman unlawfully interrogated Stovall. The so-called interrogation consisted of a statement that the Union was trying to get back in and a query as to whether Stovall knew what that meant. (GC Exh. 1(j), par. 13(b).)

Stovall testified that he was at his machine when Halterman approached him to deliver his paycheck. As Stovall reached out to take his check, Halterman "held onto it. He said, you know, the union's trying to come in, you know what that means, don't you?" (Tr. 941.) Stovall says he replied rather tartly, telling Halterman that "I sure do. We'll get treated with a little more respect." (Tr. 941.) Stovall says he elaborated on this thought, explaining to Halterman that "[I]ast year I was against it. Now that I see how you all are acting, I'm for it." (Tr. 941.)

In reply to this allegation, Halterman testified that he never made such a remark to Stovall. Indeed, he reported that, similarly to the preceding organizing effort in 2006, he was under the assumption at this time that Stovall was an opponent of the Union.

There are two difficulties with the state of the evidence regarding the General Counsel's burden of proof. Once again, we have the directly opposed testimony of two highly partisan witnesses. Stovall has a pecuniary interest in establishing a pattern of illegal behavior by his former employer as it supports his claim for backpay and reinstatement. Halterman has a clear

⁵⁸ Indeed, it would have posed an interesting question had the Employer argued that it chose to display Malcomb's uniform to send a warning message about its zero tolerance policy for lock out violations. The Employer does not make this argument. I am not surprised at this, since my ultimate assessment is that the hanging of Malcomb's uniform in the locker room was far too mundane and commonplace an event to send any kind of message, either lawful or unlawful.

interest in justifying his behavior as a management official, particularly since his conduct is the subject of many allegations of misbehavior. There is simply no corroboration for either man's accounts. I cannot credit one over the other.

5 Beyond this, when evaluating the lawfulness of statements alleged to constitute interference with protected rights, the Board refrains from adjudicating violations when the communication is too vague to impose such interference or restraint. See Volair Contractors, 341 NLRB 673, 676 (2004), and Miller Industries Towing Equipment, 342 NLRB 1074, 1075 (2004). Here, if one were to accept that Halterman asked Stovall what it would mean if the Union was to "come in," 10 it would be reasonable to conclude that he intended the answer to be something negative. Nevertheless, an employer is free to express the opinion that a union would be a bad thing for the particular workplace. See Enjo Contracting Co., 340 NLRB 1340, 1342 (2003), enf. 131 Fed. Appx. 769 (2d Cir. 2005) (employer has right to ask employees to consider whether a union would worsen their economic situation), and *Rogers Electric*, 346 NLRB 508, 510 (2006) 15 (lawful to tell employees that there is no need to call in a union to resolve issues). Stovall's description of the rhetorical question from Halterman would not convey a message of restraint or coercion of protected rights to a reasonable employee who heard it.

Continuing with his focus on Halterman's behavior, the General Counsel next contends that Halterman committed two violations in conversation with employee Devin Long on March 13, 2008.⁵⁹ (GC Exh. 1(j), pars. 13(c)(i) and (ii).) The specific allegations are that Halterman told Long that, if the Union came in, employees would no longer be able to switch their vacation days and, if they asked for higher wages, the Employer would take away holidays and raise payments for health insurance benefits.

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Devin Long is a mixer on line 4. He is the son of leading union supporter, Tina Goode. Halterman is his supervisor. Long reported that on the date at issue, Halterman engaged in a lengthy discussion with Long and fellow employee, Randy Brooks. During the 20 minute discussion, Halterman passed out company literature. He told the men that, if they sought higher wages, "we would have to give up holidays or they would make our insurance—health insurance rates higher." (Tr. 2512.) Long reported that, to illustrate his point, Halterman drew a pie chart. He explained that if one segment of the pie grew larger, another would have to shrink. He also took note that an employee had just changed his scheduled vacation day, but "if the union were to get in, that you wouldn't be able to change vacation days." (Tr. 2512.)

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While Brooks did not testify, Halterman did. Initially, he contended that he never made statements regarding the likely course of collective bargaining. He confirmed that he handed

⁵⁹ Originally, the General Counsel made a third such allegation about Halterman's statements in this conversation with Long, claiming that Halterman threatened that the Employer would eliminate its 401(k) plan if the Union won the election. (GC Exh. 1(j), par. 13(c)(iii).) Counsel for the General Counsel withdrew this allegation during the course of the trial. (See Tr. 2697.)

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literature to Long and that he replied to Long's questions about the union campaign. Most importantly, Halterman confirmed that, in order to illustrate his responses to Long's questions, he drew a pie chart and explained to Long that "they need to stay within their financial boundaries on that. The company doesn't have an unlimited financial boundary." (Tr. 3280.) He denied making specific predictions regarding vacation schedules or insurance premiums.

Unlike other uncorroborated assertions about Halterman's statements, in this instance there is clear support for Long's account. Ironically, that support comes from Halterman's own testimony. Thus, Halterman confirms that he chose to draw a pie chart to illustrate his views regarding the collective-bargaining process. Both Long and Halterman's descriptions of the use of this pie chart confirm that the clear message was that, during negotiations, the Employer would not budge from its overall financial posture, but would only confine itself to tinkering with the slices of the pie. The clear message was that, regardless of the Union, the pie would not grow any larger. As this provides clear and crucial support to Long's account of Halterman's statements, I credit his testimony about the contents of the overall conversation.

I conclude that Halterman's general thrust, and particularly his use of the pie chart, was intended to convey a message that the Employer planned to adopt a position of intransigence in collective bargaining such that the employees could never achieve an overall improvement in the terms and conditions of their employment. In other words, individual items may be increased, but only at the expense of other portions of the compensation package. This constitutes a prohibited statement that the selection of the Union would be futile. *Federated Logistics & Operations*, 340 NLRB 255 (2003), rev. denied 400 F.3d 920 (D.C. Cir. 2005). Specifically, the import of Halterman's remarks is the same as that found unlawful in two similar cases, *Economy Fire & Casualty Co.*, 264 NLRB 16, 21 (1982) (unlawful to say that "management intended to adopt a bargaining stance designed to ensure that collective bargaining could not result in any increases in benefits"), and *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977) (same).

Similarly, Halterman's statement to Long that employees would no longer be able to change vacation dates if the Union came in was also unlawful. It was not connected to any description of the vagaries of the collective-bargaining process. Instead, it was framed as an automatic result of the decision to obtain union representation. This sort of flat statement is unlawful. See *DynCorp.*, 343 NLRB 1197, 1199 (2004), affd. 233 Fed. Appx. 419 (6th Cir. 2007) (unlawful to tell employees that "should they choose union representation, they will automatically lose a fringe benefit").

I conclude that the General Counsel has established that Halterman violated Section 8(a)(1) by telling Long and Brooks that employees would lose the right to switch vacation days and also by telling them that the Employer would bargain in such a manner as to prevent any overall increase in compensation or benefits.

The General Counsel next contends that Supervisor Anderson committed an unfair labor practice in April 2008 by threatening employees with the loss of their current 401(k) plan when she stated that if the Union won the election and employees began to receive a union pension, the

Company would do away with the 401(k) plan. (GC Exh. 1(j), par. 16(c).) Unlike many other alleged violations of Section 8(a)(1), there can be no dispute about the facts involved. It will be recalled that the employee to whom the alleged statement by Anderson was made, Melissa Jones, had surreptitiously recorded the entire conversation. I have read the transcription of this recording. More importantly, I have listened to the recording, which was of very high quality, allowing me to gain insight into the tone and emotional content of the conversation.

On the surface, it is easy to discern the basis for the General Counsel's complaint allegation. The key moment comes as Jones is quizzing Anderson about what she has told other employees regarding the collective-bargaining process. Jones asserts that employees were led to believe that they would lose their 401(k) plan if the Union sought to include them in its own pension plan. Anderson responds, "I said if the pension got in here the company's going to stop the 401(k) If you got the pension, you can't have two retirements. You can have one or the other you're not going to have two!" (R. Exh. 43, p. 4.)

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This statement by Anderson seems to present an easy problem for adjudication. Posed as a hypothetical question on a law professor's labor law examination, it is clear that the correct answer to such a question would be that the statement violates Section 8(a)(1). See *E & L Plastics Corp.*, 305 NLRB 1119, 1120 (1992) (violation to tell employees that they will automatically lose their 401(k) if union is elected); *Hertz Corp.*, 316 NLRB 672, fn. 2 (1995), (same); *Federated Logistics & Operations*, 340 NLRB 255 (2003), rev. denied 400 F.3d 920 (D.C. 2005) (same); and *DynCorp.*, 343 NLRB 1197, 1199 (2004), affd. 233 Fed. Appx. 419 (6th Cir. 2007) (same).

Unfortunately, this type of reasoning represents a common thread throughout the prosecution of numerous complaint allegations against this Employer. In my view, counsel for the General Counsel in this case tend to see the people involved as stick figures, the issues as always being drawn in stark shades of black and white, and the plot line as being a melodrama of the type once associated with mustachioed mortgage holders and destitute grieving widows. Both life and labor law are far more complicated and nuanced.

I have already described the rather startling circumstances that surrounded the one particular remark by Anderson that the General Counsel asserts was unlawful. Those circumstances include the fact that Jones sought out Anderson to quiz her regarding her interpretation of the collective-bargaining process and to secretly record what she said in order to use her statements against the Employer in a setting such as this one. Having both initiated the entire discussion and steered Anderson in the desired direction, Jones was at all times the aggressive interrogator and Anderson responded defensively and even submissively.

Jones and Anderson engaged in a rambling discussion of their understanding of the parameters involved in contract negotiations. In the course of that give-and-take, Anderson made the statement complained of by the General Counsel. It is, however, impossible to ignore the many other statements by Anderson that stressed her understanding that "[t]hey're not tak[ing] away your benefits!" (R. Exh. 43, p. 1.) Anderson repeatedly explained that

"everything is on the table There are all kinds of stuff you can lose and stuff you can gain." (R. Exh. 43, p. 4.) She added, "[h]ow do I know what they're going to lose or what they're going to gain?" (R. Exh. 43, p. 5.) She specifically acknowledged that management understood that it was required to engage in "[f]air bargaining." (R. Exh. 43, p. 3.)

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Beyond Anderson's many accurate formulations about the law of collective bargaining that surrounded her one problematic statement, Anderson made a series of remarks that dramatically underscore the lack of coerciveness involved in her remarks. She pleaded with Jones to correct any misunderstandings she may have created in conversations with employees. She expressed her own favorable view of the Union, opining that if she were a member of the electorate, she would vote for representation. In frustration, she observed that if her comments to employees had been misunderstood, she would no longer "be talking to anybody about it." (R. Exh. 43, p. 5.) Finally, the entire discussion ended with Anderson's plea to Jones to tell her coworkers that "I didn't mean anything by it. Tell them I apologize." (R. Exh. 43, p. 6.)

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I find it a bit disheartening to conclude that counsel for the General Counsel here have both misapplied the Board's analytical formulation and lost sight of the actual purpose and intent behind Section 8(a)(1). As to methodology, in multitudinous cases involving employers' statements about collective bargaining that were ultimately adjudged to be either lawful or unlawful, the Board has stressed the principle that it is essential to evaluate the words in their full context. It will not do to simply pluck out an inartful, unfortunate, or mistaken phrase and turn it into a "gotcha" moment. 60 See, among very many examples, *Plastronics, Inc.*, 233 NLRB 155, 156 (1977) ("statements are objectionable when, in context, they effectively threaten employees with loss of existing benefits"); Lear-Siegler Management Services Corp., 306 NLRB 393 (1992) (statements unlawful, "if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits"); Somerset Welding & Steel, 314 NLRB 829, 832 (1994) ("statements cannot be made in a coercive context or in a manner designed to convey to employees a threat that they will be deprived of existing benefits"); Saginaw Control & Engineering, 339 NLRB 541 (2003) (employer statements must be examined in the "context" of the "totality of relevant circumstances" to determine if they "would tend to coerce a reasonable employee"); Miller Industries Towing Equipment, 342 NLRB 1074, 1076 (2004) ("issue is what the employees who were there would reasonably understand in the circumstances"); and *Empire* State Weeklies, 354 NLRB 815, 817 (2009) ("Board employs a totality of circumstances standard to distinguish" between statements that violate Sec. 8(a)(1) and those protected by Sec. 8(c).).

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While it is clearly necessary to consider all of the words spoken, the way in which they were expressed, and the dynamics between the speaker and listener, it is also vital to recall the object of the required assessment. In a society that treasures freedom of speech, there are firm limits placed on the power of Government to sanction statements made by employers. The essential

⁶⁰ In a different labor law context, the Board has recently emphasized its rejection of a "magic words" analytical approach. See *Coupled Products, LLC,* 359 NLRB No. 152, slip op. at 2 (2013).

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element that supports the right of the Board to condemn verbal expressions by employers is a finding that the totality of the evidence supports the conclusion that the statements in question would have the effect on a reasonable employee of interfering with the exercise of protected rights, restraining that employee in such exercise, or coercing or intimidating the employee from exercising the freedom to engage in protected activities. It is not the exact words spoken, but rather their presumed effect on a reasonable employee that provides the legal and constitutional support for the Board's adjudication of an unfair labor practice.

Considered in full context and in light of the purposes of the Act, Anderson's words could not have served to interfere with, restrain, or coerce a reasonable employee. In fact, the recording demonstrates that this was a case of an employee intimidating a supervisor. It was Anderson's desire to engage in free expression of opinions about collective bargaining that was effectively restrained by Jones' aggressive interrogation. A reasonable person, after listening to Anderson's full remarks, would be left with the clear sense that collective bargaining was a give-and-take process whose ultimate outcomes could not be predicted. The listener would further conclude that, in Anderson's opinion, the Employer acknowledged its duty to engage in fair bargaining and the Union offered a significant prospect of improvement of the employees' terms and conditions of employment. Viewed in fair-minded contemplation of all the fascinating complexities of human interaction, it is simply not possible to find any intimidation by Anderson in this exchange. The context and interaction is simply not possible to find any intimidation by Anderson in this exchange.

The final allegations regarding unlawful communications to employees during the 2008 organizing campaign concern three statements allegedly made by Halterman in early April. It is

⁶¹ A reasonable person could also conclude that the Employer would likely take the strong position in negotiations that, if the Union sought to include employees in its pension plan, the Employer would propose termination of the existing 401(k) program.

⁶² Indeed, this episode highlights my apprehension regarding the manner in which much of this case has been evaluated and prosecuted. In this very lengthy labor controversy, the Employer's supervisors have, on occasion, made statements that transgressed the law. However, while recognizing this fact, it is also apparent to me that the General Counsel has adopted the view that everything this Employer does must proceed from some deep-seated and ingrained animus and opposition to the law. In sharp contrast, the assumption also appears to be that the Union and its supporters are at all times forthright, guileless, and above board. For example, the General Counsel does not hesitate to accept the assurances from Jones and Price that the Union did not participate in Jones' decision to smuggle a recorder into the plant and record management's statements and meetings with employees. Of course, as one would expect, there is no hard evidence to the contrary. However, it will be recalled that, early on in its organizing effort, the Union wrote to management to warn that it planned to "document any unfair labor practices that occur." (R. Exh. 4, p. 1) This warning, coupled with Jones' clandestine behavior and her immediate provision of the recordings to union officers for transcription and use in this litigation, certainly raises questions; albeit questions that the General Counsel appears uninterested in examining. In my view, it is important for the Board's personnel to engage in objective analysis of the motives of both of the institutional adversaries and their respective supporters who are involved in this protracted conflict.

asserted that, in the breakroom, Halterman told employees that they would lose everything if the Union came into the plant. (GC Exh. 1(j), par. 13(d)(i).) Also in the breakroom, it is claimed that Halterman told employees that they could not collect a union pension along with other pensions that they were currently receiving. (GC Exh. 1(j), par. 13(d)(ii).) Finally, it is contended that, at line 4, Halterman told employees that if the Union came into the plant, the Employer would cancel its 401(k) plan. (GC Exh. 1(j), par. 13(e).)

It appears that the first two of these allegations arose from one extended conversation between Halterman and several employees in the breakroom. Alleged discriminatee, Agnes Coburn, provided the testimony about this discussion. Coburn reported that Halterman told a group of employees that "I hope you guys know that when the Union gets in here, you're going to lose everything."63 (Tr. 1204.) Although he had not been speaking to her, she interrupted his remarks by challenging him. At that point, he responded by referring her to the situation at Interbake's unionized facility in Iowa. Coburn then asserted that Halterman directed his attention to a coworker named Gracie. He told her that "if the union gets in here, you can't draw your pension from Rich's⁶⁴ plus your BCTGM pension at the same time. It's illegal." (Tr. 1205.) Lastly, it should be noted that, while the General Counsel alleges that these statements were made by Halterman on April 3 or 4, Coburn testified that they were made by him in early February.

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Halterman confirmed that something did happen between himself and a group of employees that included Coburn. He had entered the breakroom and observed four employees seated at a table. They were examining a handout that described problems with the Union's pension plan at the Interbake facility in Iowa. He took the opportunity to comment that it was "a shame what happened to those people." (Tr. 3287.) He went on to underscore his point by asserting that this was "what can happen with a union pension." (Tr. 3287.) Finally, he suggested that "it might not be worth taking a risk on it." (Tr. 3287.) Halterman testified that, at this point, Coburn interjected herself into the discussion to argue that the information about the Iowa pension contained in the handout was false. Halterman reported that he then walked away.

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If I were to credit Coburn's account, it would make out a violation by Halterman. Certainly, a blanket warning that employees are "going to lose everything," if they bring in a union is an

⁶³ Union supporter, Janice Reese, testified that, in late March, Halterman told a group of employees that they would "lose everything," in the event the Union came into the plant. On cross-examination, she provided varying and conflicting accounts of what Halterman said, including a perplexing version that involved Halterman telling employees "we could lose—you would not—he said you will lose something." (Tr. 1621.) Under further cross-exam, she conceded that Halterman "did not say we would lose everything." (Tr. 1623.) Even if this is an account of the same conversation being described by Coburn, I cannot place any weight on it for obvious reasons.

⁶⁴ The reference here is to Rich's Products, a bakery facility in nearby Winchester that closed its doors in May 2005. The Union had represented a unit of Rich's employees.

unmistakable threat of dire consequences. As it did not contain any objective basis for this catastrophic prophecy, such a statement would violate Section 8(a)(1). See *Metro One Loss Prevention Services Group*, 356 NLRB No. 20, slip op. at 1 (2010) (supervisor's statement that "it could get much worse in the event the Union comes in," violated Sec. 8(a)(1)).

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Coburn's second asserted violation by Halterman represents a different matter entirely. According to Coburn's account, Halterman told Gracie that she would be unable to collect both a pension from her prior employment at Rich's and a pension from her work at Interbake. Critically, however, he is not asserted to have claimed that this bad outcome would be the product of any action by the Employer. Rather, Coburn says that he attributed this result to the fact that it would be "illegal" for Gracie to collect on both pensions at the same time. (Tr. 1205.) Such a statement, while undoubtedly dubious as a principle of law, is not a threat of sanction from an employer. See *Baker Concrete Construction*, 341 NLRB 598 (2004) (supervisor's warning of "trouble," if employee associates with union supporters was too vague to constitute an unlawful threat because it did not necessarily mean that the employer "would be the source of such trouble").

Of course, if I were to credit Halterman's account of his statements to the group in the breakroom, the outcome would be different. Under his version of the event, he was careful to qualify each of his comments in such a way as to avoid the impression that any particular negative consequence of unionization was certain to occur. In his telling, he merely pointed out the inherent risks in selecting representation. Under Section 8(c), an employer is free to make such comments. See *Medieval Knights*, *LLC*, 350 NLRB 194, 195 (2007) (employer entitled to "point out the possible pitfalls for employees of the collective-bargaining process").

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Ultimately, I am again confronted with the stark choice between the conflicting accounts of two intensely partisan witnesses. In addition, in this hugely polarized environment, the larger context is of little assistance to me. It does reveal that Halterman was capable of making unlawful statements. Unfortunately, it also reveals that union supporters were capable of twisting and misconstruing supervisors' remarks, either intentionally or simply by viewing such alleged statements through the prism of their own partisanship. Once again, the solution to this dilemma is provided under the law through the mechanism of the burden of proof. The situation is identical to that which was well described in a decision adopted by the Board where the judge who had to resolve a conflict in testimony between witnesses named Gibson and Shaw, made the following analysis:

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I find nothing in the record to indicate one's testimony is more likely to be true than the other's. This is a "one-on-one" situation with equally credible witnesses, neither of whom was overly impressive. . . . Gibson has denied Shaw's allegations, and the allegations and denial are in equipoise. That being the case, I must, and do, find that the General Counsel has not proven by a preponderance of the evidence that Gibson made the statements attributed to him by Shaw.

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Iron Mountain Forge Corp., 278 NLRB 255, 263 (1986). Applying the same principles, I conclude that the General Counsel has not carried his burden of proving that Halterman uttered the threats alleged here.

The last allegation presents a similar situation. Union supporter, Devin Long, testified that, on April 3, 2008, Halterman handed him a pamphlet about the union pension plan and made the comment that "if the union wants to get in, that they would get rid of the current 401(k) plan in favor of the union pension plan." (Tr. 2513-2514.) Halterman recalled handing the pension pamphlet to Long. He denied making any definitive statement about getting rid of the 401(k) 10 plan, reporting that when Long raised this as a question, he told him that the answer "would depend on what kind of an agreement would be reached." (Tr. 3285-3286.)

Once again, the evidence as to exactly what Halterman said is in equipoise. Beyond this, however, there is a fatal flaw in the General Counsel's legal theory. If one credits Long's account, Halterman's statement as reported by Long is simply too vague to constitute a law violation. It is at least as likely that Halterman's reference to somebody getting rid of the 401(k) in favor of the union pension plan refers to the bargaining strategy of the Union as opposed to the intent of the Employer. This is particularly true since the initial phrase in the allegedly offense sentence was "if the union wants to get in." (Tr. 2513-2514.) Thus, "they" likely refers to the Union. Where the statement at issue is too vague to conclude that the speaker was predicting an adverse action by the employer, no violation exists. See Baker Concrete Construction, supra. I do not find Halterman's statement to Long, even under Long's version of it, to be an unlawful utterance.

25 In summary, regarding the Employer's conduct during the 2007-2008 organizing campaign, the General Counsel has proven that its supervisors violated Section 8(a)(1) by once telling employees not to talk about the Union, twice creating an impression of surveillance of union activity, and twice threatening loss of benefits. However, these violations represented isolated incidents of misconduct rather than the pervasive pattern of intimidation alleged in the 30 many unproven allegations of the complaint.

4. Alleged 8(a)(3) violations during the 2007-2008 campaign

Beyond the largely unproven claims of an extensive pattern of unlawful statements and behavior designed to intimidate employees, the General Counsel claims that this Employer embarked on a determined course of action to rid itself of union supporters by, as counsel explained in his opening statement, "firing people for looking cross-eyed and spitting on the sidewalk." (Tr. 293.) In reply, counsel for the Employer observed that he was "incredulous," that the prosecution was taking the position that the employees at issue had been fired for "petty spitting incidents." (Tr. 312.)

Having carefully reviewed the voluminous record regarding each of the 2008 disciplinary actions, I must agree with counsel for the Employer. Whatever a decisionmaker may ultimately conclude in making the Wright Line analyses in this case, one fact is crystal clear. Each of the

employees who received disciplinary action, including termination of employment, had clearly committed acts that constituted serious breaches of what the Employer genuinely considered to be its standards of proper conduct. Thus, far from being pretextual adverse actions, each of these disciplinary sanctions involves legitimate motivations to a very considerable degree. I will now explain how I have resolved these claims through application of the Board's dual motive evaluation process.

a. Phillip Underwood

The first such situation that must be addressed is the General Counsel's allegation that the Employer suspended Phillip Underwood on January 9, 2008, and discharged him on January 17, 2008, as an unlawful response to Underwood's union activities and sympathies. (GC Exh. 1(j), par. 19.) The Employer defends by asserting that it suspended and terminated Underwood for the offense of insubordination.

I must begin the *Wright Line* assessment by considering whether the General Counsel has met his burden of demonstrating that Underwood engaged in protected union activities and that the Employer was aware of his participation in such activities. Surprisingly, this is a more complicated issue than one would expect.

Underwood was hired as a machine operator in April 2006. He reported that, within the next few months, he became aware of the Union's organizing activities. It is indisputable that he signed a union authorization card on June 3, 2006. (GC Exh. 97.) He testified that he got more involved in the campaign as of "late 2006." (Tr. 1083.) He attended union meetings and reported that he obtained authorization cards from 15 people. After the first election, Underwood indicated that interest in the Union, "kind of dwindled," but resumed in the fall of 2007. (Tr. 1091.) He explained that he signed another authorization card, ⁶⁵ "but I wasn't as involved this time around." (Tr. 1091.) He did attend a few meetings.

While this account would seem to clearly indicate that Underwood was a union sympathizer and had engaged in protected union activities, there was also significant evidence to the contrary. Strikingly, while Underwood claimed to have convinced 15 coworkers to sign union cards, he was unable to provide either the Union's formal name or the local branch's number. On direct examination, the following exchange occurred:

GC: And what was the union's—what was the name of the union? I'm sorry.

UNDERWOOD: The Baker's union. I don't know the specific name but—

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⁶⁵ No such card was admitted into evidence.

GC: Do you recall the Local number?

UNDERWOOD: No.

Tr. 1082.) Beyond this, Underwood also cast doubt on his union sympathies when counsel for the General Counsel asked him what he told coworkers during the 2006-2007 campaign. He replied that "[g]enerally, what I told people was that I wasn't for the union and I'm not for the company but I'm for us, and that they have to do what's best for them and their families." (Tr. 1092.) This hardly paints the picture of a committed union activist.

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I have resorted to other testimony in resolving this issue. Union Official Price testified that during the 2006 campaign, Underwood was a key supporter. Somewhat contradictory to Underwood's own report, Robinson testified that during the 2008 campaign Underwood played a more active role than did Robinson himself.

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Examining all of the evidence, I conclude that Underwood did support the Union to some degree as evidenced by his signed authorization card dating from 2006. I do not credit his assertion that he was a major activist to the extent of obtaining many cards from his coworkers. In addition, I discount Robinson's contention that Underwood was active in 2008. This must be an exaggeration, given that Underwood, himself, claimed just the opposite. Ultimately, the evidence of union sympathy and activity is sufficient to meet the General Counsel's burden.

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The next issue concerns the Employer's knowledge of Underwood's union support and activity. While the limited nature of Underwood's protected activities indicates that caution must be employed in resolving this question, I credit testimony by Underwood and Price to the effect that Underwood served as a union election observer in the April 2007 election. I conclude that company officials would have been aware that Underwood supported the Union, at least as of that time. The evidence is sufficient to meet the burden of proof.

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As to the question of whether the Employer maintained an attitude of unlawful animus against Underwood due to his union support, once again, the evidence is thin but ultimately sufficient to carry the General Counsel's burden. There is no evidence of animus directly against Underwood himself.⁶⁶ Despite the lack of evidence of any targeted animus against Underwood personally, I have concluded that the Employer's attitude of opposition to the Union went beyond the legal boundaries to the extent that it included unlawful statements and actions that served to restrain its employees' protected union activities. As I indicated at the beginning of my

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⁶⁶ There was a documented claim in November 2007 that Underwood believed he was being harassed by Supervisors Henline and Halterman. The matter was referred to Operations Manager Cahill, who prepared a written report. That report does not contain any claim by Underwood that he was being harassed due to any union issue. (See GC Exh. 96.) Tellingly, in his testimony about the incident, Underwood did not assert that the claimed harassment at that time was due to the union issue.

legal analysis, this finding is sufficient to meet the General Counsel's burden of showing unlawful animus against the Union and its supporters.

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Having found that the General Counsel has carried his burden, the focus must now shift to the Employer's claim that it suspended and discharged Underwood for the offense of insubordination and that it would have taken these actions against him regardless of any involvement by him in protected activities. In assessing this defense, I have examined the precipitating events in close detail. I have also considered the lengthy, troubling, and very well documented past disciplinary history pertaining to Underwood. Finally, I have evaluated the Employer's disciplinary policy regarding this type of misconduct and its past application.

To begin, the Employer maintained a disciplinary process that it characterized in its handbook as, "progressive in nature," but, "still allowing the company the flexibility of considering factors such as an employee's work record, length of service, circumstances which contributed to the employee's actions, intent and seriousness of the employee's actions and actions taken by Interbake in other situations." (GC Exh. 3(b), p. 38.) As is common, the Employer specifically reserved the right to forego application of progressive disciplinary steps where the misconduct was particularly severe. Its handbook also described offenses that it characterized as, "Serious Misconduct," that would be dealt with outside the progressive framework. (GC Exh. 3(b), p. 39.) Among such serious offenses was, "Insubordination, such as refusing to perform a work assignment, or refusing to follow direction of appropriate Interbake personnel . . . or any conduct that undermines supervisory authority." (GC Exh. 3(b), p. 40.)

The Employer discharged Underwood for what it contends was a violation of this disciplinary rule. His termination notice, dated January 17, 2008, lists the cause of his firing as "insubordination." (GC Exh. 12.) The precipitating incident is alleged to have occurred on January 9. In order to evaluate that event, it is first necessary to outline certain production issues that contributed to the controversy.

It will be recalled that, since late 2007, Underwood worked as a machine operator on production line 5. Management of line 5 was vested in Line Team Leader Henline. However, since Underwood worked on the third shift, Henline was never present during his working hours. The two supervisors who were present during that shift were Anderson and Peggy Utter. Underwood's principal defense to the charge of insubordination in this case is his assertion that he was obeying the procedures mandated by Henline.

Anderson testified that she and Utter had supervisory authority over all production employees on the third shift. She was not required to consult with Henline before exercising such authority. Instead, if issues arose during her shift, she would discuss them with Henline at 7 a.m. when they were both present momentarily at the change of shifts. Operations Manager Cahill supported this view of Anderson's authority. He explained that Anderson had the right to "give direction. If there was conflict, the employee should follow the direction of the [supervisor] on that shift. And then it could be resolved the next day or whatever, if there was something that was monumental." (Tr. 3456.)

General Counsel's witness, Connie Runion, was another production employee assigned to the third shift. She confirmed that Anderson and Utter were the supervisors on that shift and that employees were required to follow their instructions and could expect to be disciplined if they failed to do so. In fact, under cross-examination, Underwood also conceded that on the third shift Anderson and Utter had, "overall responsibility . . . throughout the facility." (Tr. 1137.) [Counsel for the Employer's wording.]

In his testimony, Underwood described the events that led to his discharge. He reported that on January 9, about an hour into his shift, Anderson instructed him to "write down every second of downtime" on his machine. (Tr. 1099.) He believed that this order was at odds with Henline's policy which required machine operators to document downtime only if it lasted for more than 5 minutes. As a result, he responded to Anderson's instruction by replying, "well, Janet, we don't do—in this department, we don't practice writing down, you know, downtime in seconds." (Tr. 1099.) She persisted in her view that this was required. On hearing this, Underwood explained that since Anderson was "fairly new to this, why don't we have a meeting with some of the other [supervisors] and Human Resources so . . . everybody can get on the same page about the downtime." (Tr. 1099.) He reported that this angered Anderson who yelled at him. She told him she was his supervisor and if he did not want to do what she said, he could go home. He asserted that, "in the same breath," Anderson then said, "[I]f you don't leave, I'm going to call security." (Tr. 1099.) On hearing this, he logged off his computer and left.

Under cross-examination, Underwood conceded that on the night at issue, Anderson had given him the instruction to record all downtime more than once. It was after she repeated the order the second time and he demurred, citing Henline as his reason, that Anderson became really angry and told him that she was his supervisor. Significantly, Underwood then engaged in the following exchange with counsel:

COUNSEL: That's when she got up in your face and she didn't care what anyone else said, she was the [supervisor] and you were supposed to do what she said.

UNDERWOOD: Correct.

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COUNSEL: And at that point in time, you again said that's not how we do

⁶⁷ To the extent that Underwood is trying to claim that Anderson suspended him without giving him a chance to agree to follow her instructions, I reject his account. As will be seen, his claim in this regard is inconsistent with the testimony of Anderson and his own admission to Slaughter. Furthermore, Anderson's description of Underwood's ultimate refusal to obey is totally consistent with Underwood's documented pattern of interacting with supervisors by insubordinately walking away when being told something he did not like

things in this area, correct?

UNDERWOOD: Correct.

5 (Tr. 1165.)

Anderson's account of this event is not much different from Underwood's. She did, however, offer certain background information concerning the origin of the controversy that led to her decision to send Underwood home. She reported that she had two supervisory issues regarding Underwood's performance that led to the confrontation. While one of those issues involved the practice of recording downtime, the second involved a complaint that she had received the preceding night. On that occasion, Underwood's operation had produced bad product and the baker complained that efforts to communicate with Underwood about the problems had been unsuccessful. Anderson had been informed that the baker had "called and called and couldn't get [Underwood]." (Tr. 3356.) She instructed Underwood to keep the baker informed about production problems and he indicated that he would comply. She explained that this was necessary because, in the event of problems with Underwood's production, the baker needed to adjust oven temperatures and other settings in order to avoid more serious issues, including the risk of fire.

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Anderson reported that the same problem arose on Underwood's next shift. She went to him and said, "I told you yesterday you've got to communicate with the baker." (Tr. 3359.) She also instructed him to record all downtime. Her purpose was to enable the maintenance department to analyze the difficulties with this portion of the production line. Underwood refused to comply, telling her that "he didn't have to listen to us." (Tr. 3360.) Underwood went on to inform her "that they never did it like that before, and there's no reason to do it that way, and he wasn't going to do it." (Tr. 3360.) He attempted to walk away and she "walked back with him and told him he could not stay." (Tr. 3360.) At first he refused to leave, but when she threatened to call security, he left.

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The General Counsel produced the testimony of Vickie Whittington, another production employee on the night shift. She reported that she heard part of the confrontation between Anderson and Underwood. Whittington confirmed that Anderson actually had two issues with Underwood's performance, the recording of downtime and the communication with the baker. She heard Anderson tell him "to document every time they went down regardless whether it was 30 seconds or longer, he was to document it." (Tr. 1047.) He responded, "[w]e don't have time." (Tr. 1047.) She also told him to inform the baker and he said, "[i]t's always been a rule of thumb if you're not down longer than five minutes, you don't call the baker." (Tr. 1048.) He told Anderson that Henline told him he did not have to do so. Whittington indicated that this

particularly angered Anderson. She gave Underwood an ultimatum, advising him that "he would do it or she'd send him home, and he said do whatever you have to do, Janet." (Tr. 1048.)

In the days following Underwood's suspension, HR Manager Slaughter conducted an investigation of the incident. She interviewed Underwood, Anderson, and Whittington.⁶⁹ Her notes document Whittington's very sensible summation of the problem posed by Underwood's behavior. While Whittington supported Underwood's position on the merits of Anderson's instructions, she opined that "he should have said I'll finish out the shift doing it the way Janet wanted him to and then meet with Janet and Dennis [Henline] to figure out how it should be done." (GC Exh. 11, p. 2.)

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After interviewing all concerned, Slaughter discussed the matter with Schleuss and Cahill. They agreed that "termination was appropriate in this case . . . [b]ecause he had refused to do something that he was told to do." (Tr. 149-150.) Slaughter prepared the termination form which noted that the reason for Underwood's discharge was, "insubordination." (GC Exh. 12.) She also notified Underwood of his termination.

⁶⁸ The General Counsel seeks to go into the merits of the dispute between Underwood and Anderson. Amazingly, counsel for the General Counsel assert that, "Anderson gave Underwood an absurd instruction that no reasonable production employee or machine operator would have or could have carried out." (GC Br. p. 164.) Obviously, the Government does not run this factory and such an opinion is clearly beyond the scope of the Board's authority. As Judge Clark observed when this was raised by counsel for the General Counsel at trial, "It was an order from the supervisor . . . that changed the policy. Isn't that what we're dealing with from Underwood?" (Tr. 2009.) While I certainly do not find it within my purview to decide how to bake the cookies, I will note that, while Whittington attempted to bolster Underwood's position by agreeing that Anderson's directives were mistaken and impractical, she did admit that, on the issue of contacting the baker, "[t]echnically, you should." (Tr. 1055.) The most interesting insight into the merits of the dispute was provided by another employee, Jerry Rickard. He reported that, at a line team meeting, Underwood had asked Henline about calling the baker if the downtime were less than 5 minutes and Henline said they did not need to do so. Tellingly, Rickard added that, Henline told the assembled workers that he and Anderson "don't see eye to eye on this." (Tr. 2632.) Indeed, Underwood conceded that this had been an "ongoing issue" at the plant. (Tr. 1097.) Whoever was right as to the merits, Underwood's duty was to obey his direct supervisor, the only authority actually present when the issue arose that night. Any other interpretation would lead to industrial chaos.

⁶⁹ Slaughter's contemporaneous report of her interview with Underwood states that, ultimately, Underwood admitted his insubordination. She wrote, "[a]t the end of the conversation, Phillip confirmed that Janet did tell him she wanted him to do it differently and he didn't do it. Instead, he tried to explain the way they had been doing it." (GC Exh. 11, p. 2.)

⁷⁰ Not surprisingly, Anderson testified that she agreed with this decision by her superiors. Her sensible rationale is worth quoting, "you don't tell a supervisor that you're not going to do it. You do it and then question it higher up later, but you do it." (Tr. 3376.)

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It is now necessary to determine whether Underwood's discharge was the Employer's sincere response to his alleged misconduct and, more importantly, whether the Employer would have taken the same actions against Underwood regardless of his union sympathies and activities. In making this assessment, the starting point must be Underwood's conduct on the night in question.

It is evident that Underwood's steadfast refusal to comply with Anderson's instructions about recording downtime and calling the baker met the Employer's definition of insubordination. His conduct fit three key prongs of that definition. It constituted a refusal to perform two work assignments, it was a refusal to follow directions of a supervisor, and it was conduct that undermined supervisory authority on the night shift.

The Board has long recognized that "defiance of a direct order by his supervisor is the type of conduct an employer cannot condone." *Guardian Ambulance Service*, 228 NLRB 1127, 1131 (1977). All three of the persons present at the key moments confirm that this is what Underwood took it upon himself to do. The flagrant manner of his misconduct, coupled with the serious nature of that misconduct, lend weight to the Employer's assertion that the genuine motive for Underwood's discharge was his insubordinate behavior.

While this evidence is telling, I have gone beyond it in order to examine whether other circumstances support or undermine the Employer's defense. In particular, I have examined Underwood's employment history and the Employer's record of enforcement of its work rule prohibiting insubordination.

In applying its disciplinary process, the Employer specifically states that it will rely, to an appropriate degree, on the employee's "work record." (GC Exh. 3(b), p. 38.) Underwood's work history is replete with problems, including problems directly related to his defiance of authority in the workplace.⁷¹

While Underwood's documented employment record shows a wide variety of workplace offenses such as time and attendance problems, safety issues, and production deficiencies, I will focus on those documented instances of conduct that directly resemble the conduct that led to his discharge. These problems began to be documented approximately a year after Underwood was hired.

In May 2007, HR Manager Judy Underwood prepared a report regarding a meeting with Underwood and his supervisor at that time, Jim Sampson. It notes that Sampson had complained

⁷¹ The Board has noted that an "impressive" history of documented workplace infractions is powerful evidence negating any claim of pretext. *Airborne Freight Corp.*, 343 NLRB 580, 583, fn. 13 (2004) (charge dismissed under *Wright Line* where employee had "lengthy, varied, serious, and sustained" record of disciplinary violations).

that "several times, Phillip has simply walked away from him when he is trying to talk to him." (R. Exh. 25.) The HR manager explained to Underwood that "[f]ailure to respond to business related questions is insubordination." (R. Exh. 25.) He was warned that further instances of such conduct could lead to discipline, including termination.

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More information about Underwood's behavior toward Supervisor Sampson is found in other contemporaneous documents. On May 16, 2007, Sampson wrote a notation that he had attempted to counsel Underwood about missing a team meeting and, "I again asked him if he understood + did he have any questions. As usual he did not answer. I asked him a total of 4 times before he said 'I heard you.'" (R. Exh. 80, p. 1.) This was consistent with Sampson's earlier note, dated April 29, 2007, observing that Underwood "will walk away from me when I am trying to talk with him. I can be in the middle of saying something + he will walk away throwing his hand to me." (R. Exh. 80, p. 4.)

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Additional problems were documented several months later. On August 28, 2007, Anderson prepared a report regarding difficulties with Underwood. This document is particularly compelling evidence in the Employer's favor as it establishes the precise pattern of misbehavior that would culminate in Underwood's termination. Thus, Anderson lists problems with Underwood's performance, including, "[c]ommunicating with fellow teammates so as to reduce [waste product] and downtime," and "[a]ggressive attitude and insubordination toward [supervisors]." (R. Exh. 28.) She noted that "he has been documented many times for insubordination even as far as a 'written reminder' by Judy Underwood and Jim Sampson dated May 26, 2007." (R. Exh. 28.) It was precisely these types of misconduct that Anderson again witnessed on the day she suspended Underwood."

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The degree of Anderson's concern about Underwood's behavior at that time is illustrated in an email that she sent to Slaughter, seeking advice about her problems with Underwood. She told Slaughter that when she asked Underwood to replace a bandaid he was wearing with a company-issued bandaid,⁷⁴ he reacted in a "threatening manner." (R. Exh. 78.) She also reported that he engaged in similar behavior on another recent occasion when she was attempting "to find out why he wasn't answering the phone or fixing the line." (R. Exh. 78.) Slaughter

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⁷² This is a reference to an incident on August 24 when a baker reported telephoning Underwood three times and his failure to pick up the phone on any of those occasions. See Anderson's report about this incident at R. Exh. 101.

⁷³ During this August meeting, it appears that Underwood was rather unrepentant. Anderson wrote that he told Anderson that he "disagrees and says he has a different viewpoint." (R. Exh. 28.)

⁷⁴ The Employer prohibits use of ordinary bandaids, but provides its employees with company-issued ones that contain a metal strip. The purpose is to protect the food products. If a bandaid should fall into the dough, the metal detectors used to locate foreign substances in food products would detect the company-issued bandaid.

replied to Anderson's query by reminding her that "she can suspend [employees] if they become insubordinate" (R. Exh. 78.)

In sum, the documentary evidence clearly establishes that Underwood's behavior on January 9 was part of an entrenched pattern of inappropriate interactions with supervisors. A variety of efforts had been undertaken by the Employer to counsel and warn Underwood about this behavior. His conduct on January 9 revealed the futility of these efforts. I have previously observed in connection with multiple warnings issued to Robinson for a pattern of repetitive misbehavior, that this Employer displayed an attitude of considerable forbearance. In my view, the same is true regarding Underwood. Indeed, during the period when his union activities had been more intensive and visible, supervisors confined their disciplinary actions to warnings and counseling. At the time of his discharge, his union activities had all but ceased. In contrast, his insubordinate attitude and conduct remained constant. It was that behavior that motivated his discharge.

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This conclusion is reinforced by examination of the Employer's disciplinary records as to other employees. It reveals no inconsistent treatment of employees and shows a classic example of consistent prior discipline of an employee who is not alleged to have been a union supporter. Thus, on December 10, 2007, Cara James was discharged for "insubordination." (R. Exh. 81.) The termination report explains that "Cara refused to speak to her [supervisor] about a production issue," and she then became "belligerent." (R. Exh. 81.) A contemporaneous email sheds more light on this matter. It reflects that James' offense was the failure to communicate with coworkers about a production problem coupled with a refusal to engage in a discussion about the issue with her supervisor. The stunning consistency of this disciplinary action underscores my conclusion that the Employer's proffered reason for Underwood's discharge was genuine and that it would have discharged Underwood even if he had not had any involvement with the Union. The Employer has convincingly carried its burden under *Wright Line*.

b. Agnes Coburn

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The General Counsel's next allegation of unlawful discrimination against a union supporter concerns another dispute between an employee and a supervisor that occurred on January 22, 2008. After this event, Supervisor Halterman issued a written warning to Agnes Coburn. It is contended that the imposition of this sanction was motivated by animus against Coburn due to her union support. (GC Exh. 1(j), par. 19.) The Employer responds by contending that the warning issued to Coburn was strictly intended to sanction her for misconduct in the performance of her duties.

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Applying *Wright Line*, it is evident that Coburn was an early and open union advocate. She served as an election observer for the Union during the April 2007 vote. When organizing activity resumed some months later, Coburn signed an authorization card dated January 16, 2008. (GC Exh. 98.) At this time, she also made it a practice to display a union bumper sticker on her car and to wear a union T-shirt under her uniform. She engaged in "a lot" of discussions

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about the Union with coworkers. (Tr. 1196.) The record clearly establishes her status as a union supporter.

At the second step of the analysis, there is also considerable evidence that management was aware of Coburn's union support. In addition to her open displays of such support, it appears likely that even the highest levels of management were familiar with her opinions on the topic. She maintained a warm and friendly relationship with General Manager Kantner and reported that on one occasion when they discussed the issue, he told her that "he knew how I felt about the union and that it was okay for him and I to agree to disagree about the union." (Tr. 1196-1197.)

As to the question of management's unlawful animus against union supporters, the record demonstrates that supervisors did engage in several forms of unlawful conduct designed to restrain and interfere with employees in their exercise of protected activities. While none of this misconduct was specifically directed against Coburn, the evidence is minimally sufficient to carry the General Counsel's burden.

The burden now shifts to the Employer to demonstrate that it acted out of legitimate motives and that it would have sanctioned Coburn in the identical manner regardless of any participation by her in protected union activities. For some reason, counsel for the General Counsel find the warning issued to Coburn to be a particularly egregious form of misconduct. As they phrased it, "Respondent's discipline of Agnes Coburn for 'sweeping,' epitomizes the disingenuousness of its whole campaign against Union supporters." (GC Br. at p. 176.) This assertion is accompanied by a footnote stating that the Employer's defense was that Coburn was disciplined for "sweeping," as revealed in the language of the write up that she was issued. (GC Br. at fn. 142.)

My own examination of the record leaves me completely baffled by this viewpoint. While Halterman's so-called "written reminder" to Coburn mentions that she was "sweeping," it is perfectly obvious from a full reading of the text that sweeping had nothing to do with her disciplinary sanction. (GC Exh. 99.) She could as easily have been baking, mixing, or for that matter, playing poker. The point Halterman was making in the write up did not concern what she was doing, it concerned what she was not doing. His point was that, while she was assigned the duty of inspection, she was not properly inspecting. I reject the General Counsel's characterization of the Employer's rationale as specious.

I will now assess the facts and circumstances involved in evaluating the Employer's real contention regarding its rationale for imposing a sanction against Coburn. Coburn began work at the Front Royal facility in February 2006. At that time, she was an employee of the temporary agency. She served as a packer and, significantly, as an inspector. In August 2006, she was hired by Interbake. Her assignment was as a break relief machine operator on the second shift at line 1. A break relief operator is expected to fill-in for the employees assigned to particular production duties when they are on their breaks. Among those assignments is the job of inspector, the same position she had filled early in her work history at the plant.

The incident under scrutiny occurred during Coburn's shift on January 22. Her supervisor was Halterman. During the course of her shift, he assigned her to assist Clyde Stovall, who was working as a wafer inspector. On direct examination, counsel for the General Counsel asked Coburn to describe the responsibilities of a wafer inspector. She explained that those responsibilities "are to watch for bad wafers coming down the line and to input information into the IBM [computer]." (Tr. 1220.) This is a crucial piece of testimony, as the crux of this matter is the question of whether Coburn was properly discharging those duties.

Everyone agrees that on the day at issue, line 1 was experiencing production problems. As Coburn described it, "[W]e had a mess with the wafers." (Tr. 1224.) Coburn testified that, during this time, Halterman assigned her to assist Stovall by watching the line while Stovall inputted information into the computer. That computer is located on one side of the production line, the side referred to as the "control side." While she was inspecting, a batch of bad wafers came down the line and she dumped them onto the floor in accordance with normal practice. Once the line resumed production, she told Stovall to "take his break, that I would clean up the mess." (Tr. 1230.) As she described it, at this point the line was running "perfect," but she grew concerned about the safety hazard posed by the waste products that had been dumped onto the plant floor. (Tr. 1230.)

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Being concerned that workers could slip and injure themselves on the spilled wafers, she testified that she "walked around to the non-control side of the line with the broom, the dust broom, and I proceeded to push the wafers out of the middle of the walkway." (Tr. 1233.) Coburn testified that, at this point, Supervisor Halterman approached and instructed her that, "Agnes, I need you to stop sweeping the floor and keep an eye on the wafers because the SIG operators are getting bad wafers up at the SIG." (Tr. 1235.) She objected, telling Halterman that she was watching the wafers. In what strikes me as a rather gentle approach to correction of what he perceived as an employee's error, Coburn says Halterman then explained to her, "[O]kay. Well, why don't you just put the broom down and watch the wafers." (Tr. 1233.) Coburn testified that she complied with this instruction and continued serving as inspector until Stovall completed his break.

While Coburn's account of her conduct painted a rather benign picture, Halterman's testimony indicated something else entirely. He reported that the problem began after he had assigned Coburn to watch the line while Stovall entered data into the computer. He then saw her sweeping the floor on the noncontrol side of the line. He told her to "stop sweeping and to watch the line to make sure there was no bad product going down to the packaging machinery." (Tr.

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⁷⁵ This was underscored during cross-examination, when Coburn agreed with counsel's assertion that "the whole purpose" of the inspector position was to make sure that "bad product doesn't get by them." (Tr. 1262.)

3292.) He testified that she followed his instruction. Thus, to this point, his account mirrors that of Coburn.

Significantly, however, Halterman's testimony continued with his report that he again observed Coburn about 10 minutes later. To his surprise, he saw that she was "sweeping the floor again and not watching the line." (Tr. 3292.) Because Stovall was on break and Coburn was on the noncontrol side of the line, this meant that nobody was stationed at the computer. In addition, Halterman concluded that Coburn's decision to resume sweeping meant that she was not focused on observing product going down the line. (It will be recalled that Coburn had testified that the two duties of the wafer inspector were to watch the product going down the line and to input data into the computer.) At that time, Halterman told her that he was "going to write her up for poor job performance because if the—if bad product goes down to the packaging equipment, then we get a jam up." (Tr. 3292.)

I must now determine whose account is entitled to credence. Both witnesses are highly interested and highly partisan. In resolving this dispute, I place great weight on the contemporaneous documentary evidence prepared by Halterman and on the fact that, while Coburn vigorously dissented from the discipline imposed and took her objections up the entire chain of command, she did not then dispute Halterman's written account of the facts.

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As Halterman had informed Coburn that day, he prepared a "written reminder" to document her poor performance at the wafer inspection station. In that report, he provided a very clear description of two separate incidents. As he put it, he found her sweeping and told her to watch the line while Stovall inputted data. Then, "[t]en minutes later, I found you giving the vibrator inspector a break and you were again sweeping rather than inspecting." (GC Exh. 99.) Halterman's description is further corroborated by another contemporaneous account contained in an email that he sent to various managers at 10:13 p.m., just a few hours after the events. That email also states that he redirected Coburn from sweeping to inspecting and then, "[a] few minutes later," he observed her sweeping for a second time. (R. Exh. 99.)

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It is important to note here that there is no dispute that Coburn was shown Halterman's account of the episode contained in the written reminder that he issued to her. She vigorously defended her conduct by claiming that she was watching the wafers and cleaning the area simultaneously. Being very dissatisfied with Halterman's action, she took her case to Safety Manager Gronczewski, HR Manager Slaughter, and Plant Manager Kantner in succession. In her accounts of these protests, she does not contend that she registered an objection to Halterman's description of two separate incidents. Instead, she continued to maintain that she was able to both sweep and inspect effectively at the same time. In addition, she told both Slaughter and Gronczewski that she felt she was being persecuted due to her union support, describing Halterman's conduct as a "witch hunt." (GC Exh. 50.)

I conclude that Halterman's account is the reliable one. It is supported by his reports written at the time. In addition, while Coburn was vigorous in her attacks on Halterman's behavior toward her, she did not dispute his description of the facts at the time of these events. It

is only on the witness stand that she provided a much more innocuous description of her conduct that day.

Having found that Coburn chose to sweep the floor on two separate occasions, I must examine the reasonableness of Halterman's response to this conduct. Did it make sense for a supervisor to impose a written warning against an employee who engaged in Coburn's conduct? If not, then the allegation of unlawful motivation is bolstered. In answering this question, I begin with Coburn's responses to questions about her conduct while under cross-examination. In those responses, she conceded two key points. She grudgingly admitted that, while sweeping, she had to divide her attention between the production line and the floor where the wafers were being swept. In addition, she agreed that the wafer inspector is normally positioned at the control side of the line because, in counsel's words, the computer located there "is regularly sort of spitting out information so you can make sure the product's good." (Tr. 1265.)

I conclude that Coburn's conduct that day involved three examples of deficient performance. First, she chose to leave the inspector's proper position at the computer. Second, she chose to divide her attention between inspecting and cleaning. Third, and perhaps most importantly, she chose to persist in her conduct after having been directly instructed to refrain from it. The imposition of a written counseling represents a measured and entirely reasonable response to such misconduct. I find nothing suspicious about the issuance of this warning to Coburn.

I have also examined the Employer's responses in other situations where an employee refused to obey work instructions. I have already noted that this Employer fired Phillip Underwood and Cara James for more egregious examples of defiance of a work instruction. It is noteworthy that Coburn's sanction was far less serious. Beyond this, I found it highly probative that there was one other example of very similar misconduct in the Company's personnel records. On December 19, 2007, Supervisor Madigan issued a final written warning to Robinson. The description of the circumstances indicates that Madigan had assigned him to the job task known as re-work. Later, she observed him "cleaning up at the line 1 Sig" instead of doing the re-work. (R. Exh. 10.) She told him to stay at the re-work assignment. Madigan then reports that "I found you again later in the day" also at the line 1 SIG. The only difference between Robinson's misconduct and that of Coburn is that Madigan indicates that, still later that day, Robinson was "loud, sarcastic and defiant" toward her. (R. Exh. 10.)

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⁷⁶ To be clear, I am not suggesting that Coburn was being defiant in the manner of Underwood. I credit the sincerity of her belief that it was more important for her to sweep than to inspect. While I appreciate Coburn's dilemma that day, Slaughter provided the correct solution to it. She told Coburn that in the future, "strictly watch your machines . . . and don't worry about housekeeping. If you have a problem with housekeeping, call J.P. [Halterman] and he'll try to get someone down there." (Tr. 1248.)

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Coburn and Robinson engaged in roughly the same misconduct. Their sanctions were similar. To the extent Robinson's was more severe; this is explained by his additional defiant stance. Robinson was an even more prominent union supporter than Coburn. Despite this, no party in this case has asserted that the discipline issued to Robinson on this occasion was unlawfully motivated. I conclude that both Robinson and Coburn's warnings were legitimately motivated and compellingly consistent with each other. This again supports the validity and sincerity of Coburn's sanction.

Finally, it is necessary to comment on the General Counsel's disdainful view of the Employer's conduct here. Indeed, counsel for the General Counsel characterize the Employer's rationale as "wholly spurious" and consisting of "sheer absurdity." (GC Br. at pp. 177, 178.) This is based on the view that Coburn was trying to maintain a safe working environment and this Employer had stressed the need for such safety awareness. What this position indicates is that the Government disagrees with the wisdom of Halterman's supervisory decisionmaking process. In its view, the plant would have been better managed if Halterman had chosen to acquiesce in Coburn's choices. As the Board has stressed many times, "our role is not to assess whether the Respondent made a good decision." *Children's Services International*, 347 NLRB 67, 71 (2006).

For what it may be worth, this Employer's actual decision can hardly be dismissed as unreasonable. I note that the General Counsel is entirely silent as to a key aspect of Coburn's misconduct. When Coburn chose to ignore Halterman's direct order to stop sweeping and stay at her control station and inspect, she engaged in an act of subordination. The Employer defines this concept, in pertinent part, as "refusing to follow direction of appropriate Interbake personnel." (GC Exh. 3(b), p. 40.) The Board agrees that an employee who leaves his or her workstation after a direct instruction to remain there has engaged in an act of insubordination. See *Parker Hannifin Corp.*, 259 NLRB 263, 266-267 (1981) (leading union proponent lawfully discharged for refusing orders to return to workstation), and *Neptco, Inc.*, 346 NLRB 18, 20 (2005) (where "[employee] had been directed to stay at his machine, had failed to do so, and thereby had engaged in insubordination," his discharge was lawful).

I readily conclude that the written warning issued to Coburn by Halterman was entirely based on her repeated misconduct and was not the product of any unlawful animus against her due to her union support. The Employer has carried its burden of demonstrating that it would have issued this warning to Coburn regardless of her advocacy for the Union.

c. Connie Nelson

The General Counsel's next allegation of unlawful discrimination concerns the discharge of Connie Nelson on January 23, 2008. This adverse action is asserted to be the product of the Employer's animus against Nelson arising from her union sympathies and activities. (GC Exh. 1(j), par. 19.) In response, the Employer contends that its lawful and actual rationale for Nelson's discharge was "her unprecedented accident history. The Company simply could not achieve its safety goals with her pattern of accidents." (R. Br. at p. 35.)

Applying *Wright Line*, it is clear that Nelson was a union supporter. Organizer Price reported that she was a member of his organizing committee for the 2006 union campaign. It will be recalled that, by the terms of the parties' private election agreement, the Union was authorized to set up a table inside the facility so that officials could meet with employees to discuss representation. Price complained that this table was set up immediately outside the human resources office at the plant. As a result, he opined that few employees would stop to chat. However, he reported that Nelson was one employee who did so.

Robinson also testified that Nelson was "very strong and adamant" about the Union and often discussed representation with her fellow employees. (Tr. 749.) Regarding the renewed organizing effort, the record demonstrates that Nelson signed an authorization card on January 10, 2008. (GC Exh. 100.) Price again reported that she was a major supporter of the Union at this time. The evidence clearly establishes at Nelson engaged in protected union activities and was a union sympathizer.

At the second *Wright Line* step, the quantum of proof is a bit more equivocal. In particular, Nelson provided testimony that casts some doubt on this issue. She described her union activity during the first union campaign as having been limited to one conversation with a union officer. She reported engaging in more activities during the second campaign, but candidly responded to a question as to whether management was aware of her union support by replying, "I'm not sure." (Tr. 1283.) On balance, I conclude that this record is sufficient to support the conclusion that management was aware that Nelson was a union supporter; however, there was no reason for them to conclude that she was a major actor in the organizing effort.

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As to the issue of unlawful animus, I have already noted that the Employer committed a number of unfair labor practices during both the 2006 and 2008 organizing campaigns. While none of these involved the imposition of discriminatory adverse personnel actions, they were of a quantity to provide sufficient evidence of animus. While I also note that, in no instance, did these established unfair labor practices directly involve Nelson, I find that the General Counsel has carried his initial burden, albeit to a minimally sufficient degree.

The burden now shifts to the evaluation of the Employer's stated rationale for Nelson's discharge. Before assessing the specific circumstances involved in Nelson's situation, it is necessary to acknowledge the context cited by the Employer. Earlier in this decision, I have described the Employer's resolve to place additional focus and emphasis on the issue of workplace safety following several serious industrial accidents. The Employer presented an impressive array of contemporaneous documentary evidence establishing this increased scrutiny on workplace safety, including pressure from the parent organization and tightening of its own safety standards, such as the zero tolerance policy for lock out violations.

A few overall observations are appropriate in order to place this in proper perspective. The General Counsel views the Employer's claims regarding efforts to improve workplace safety with an attitude of disdain. Actions taken under the label of enforcement of safety procedures in

this case are asserted to be mere pretexts designed to disguise the elimination of union supporters from the workplace. In my view, where there is clear evidence of a safety issue having been present in a disciplinary situation, the motivational analysis should proceed with due caution for two reasons.

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In the first place, the Board has always stressed that it does not sit as a court of appeals regarding the wisdom of management's behavior and decisionmaking. It has emphasized that an employer may make workplace decisions "on any basis it chooses, good, bad, or indifferent—as long as it is not an unlawful basis The wisdom of the Respondent's decision is immaterial. We are concerned only with discerning the sincerity of the Respondent's contention that the decision was not motivated by union animus." *Children's Services International*, 347 NLRB 67, 70 (2006). In the same vein, the Board has noted that, "[a]n employer has the right to determine when discipline is warranted and in what form The Board's role is only to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts." *Cast-Matic Corp.*, 350 NLRB 1349, 1358 (2007). These principles must be borne in mind when assessing the General Counsel's assertions that the Employer's focus on safety was undeserving of credence.

In my view, this is particularly the case when an employer's asserted rationale involves issues of workplace safety and health. The Board has repeatedly placed great weight on contentions by parties that their behaviors are justified in the interest of such concerns. For example, the Board holds that matters of health and safety are mandatory subjects of collective bargaining. *American National Can Co.*, 293 NLRB 901, 904 (1989), enf. 924 F.2d 518 (4th Cir. 1991). Requests for information regarding such issues are presumptively relevant, since "[h]ealth and safety matters regarding the unit employees' workplaces are of vital interest to the employees." *Detroit Newspaper Agency*, 317 NLRB 1071 (1995). Put yet another way, the Board has noted that "[f]ew matters can be of greater legitimate concern to individuals in the workplace . . . than exposure to conditions potentially threatening their health, well-being, or their very lives." *Minnesota Mining & Mfg.*, 261 NLRB 27, 29 (1982), enf. 711 F.2d 348 (D.C. Cir. 1983).

It is entirely logical to infer that the Board would take the same position regarding management's desires to improve workplace safety. Interestingly, such an inference is not required. Very recently, the Board made this clear by adopting the trial judge's rejection of a claim of unlawful discrimination where a lead union supporter was discharged pursuant to a legitimately increased safety awareness campaign. See *Dish Network Corp.*, 359 NLRB No. 108 (2013). I will discuss this precedent in more detail later in this decision.

The general point to be underscored here is that where an employer asserts that a workplace safety campaign formed the basis for an adverse action, that contention must be given careful consideration in circumstances where, as here, the genuineness of that safety campaign is

well established through persuasive evidence and the employee has been shown to have committed safety infractions as alleged.⁷⁷

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Turning now to the specific circumstances involved in Nelson's discharge, the record reveals that she was hired in September 2006. Since October 2007, she had worked as a cleaner and relief operator on the third shift. Nelson was terminated on January 23, 2008. The termination report states that this decision was taken due to "[u]nsafe act on 1/20/08 + excessive accidents (7)." (GC Exh. 57.)

Because the stated rationale for Nelson's discharge relies on a consideration of her history of industrial accidents, I will now examine the record regarding that history. It begins approximately 2 months after her hire, when she banged her head on a piece of equipment while cleaning a roller. This occurred on November 1, 2006. The event was described in an investigative report prepared by Safety Manager Gronczewski on November 3, 2006. (GC Exh. 60.) In her testimony, Nelson confirmed the accuracy of this report, but disputed the claim that she was subsequently issued a bump cap.

Just over a month later, on December 6, 2006, Nelson was injured when she walked into a pillar, hitting her knee in the process. On the following day, her supervisor, Henline, prepared a report, observing that Nelson needed to be "aware of her surroundings and to be attentive of when she is walking in the area." (GC Exh. 61.) In her testimony, Nelson explained that she had been "rushing around" in order to meet the demands of her job. (Tr. 1310.)

The events involved in Nelson's knee injury on this occasion underscore the need to view management's concerns about her pattern of behavior with a fair-minded attitude. While the General Counsel appears to belittle management's attitude based on the apparent minor nature of each individual accident, the full history of the event that occurred on December 6 reveals that

⁷⁷ Such an approach to workplace safety is also consistent with the Board's duty to accomplish its statutory missions without any unduly adverse impact on other important statutory and regulatory goals. As the Supreme Court has explained, "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). It is interesting to note that the Employer's documentation of its safety program contains numerous references to the need to comply with OSHA regulations arising from the Congressional objectives established in the Occupational Safety and Health Act of 1970. As recently expressed in a message by President Obama, the goal is to ensure that "when a worker steps up to an assembly line . . . their country stands alongside them, protecting their safety." Proclamation for Workers Memorial Day, 2013, issued April 26, 2013. A failure to accord appropriate weight to this Employer's increased emphasis on compliance with the demands of workplace safety laws would have the potential to undermine other key elements of the nation's labor policies. The value of this Employer's increased emphasis on safety was illustrated by Schleuss' testimony that reportable injuries declined from 34 or 35 in 2007 to just 17 in 2008. Obviously, this benefits all who work at the facility.

such an attitude is inappropriate. Thus, Nelson testified that she did not seek medical attention for this knee injury at the time. However, the condition of her knee "continually got worse." (Tr. 1309.) She eventually sought medical treatment and ultimately underwent arthroscopic knee surgery. This required her assignment to light duty from June until October 2007. Clearly, this history underscores the Employer's legitimate basis for concern about even apparently minor industrial accidents.

Just about 2 weeks after her knee injury, Nelson suffered her third industrial accident within a space of 6 weeks. On December 15, 2006, she bruised her lower back while attempting to scrape material off the production line. Supervisor Utter prepared an investigative report regarding this injury on the same day. (GC Exh. 62.) In her testimony, Nelson confirmed that she injured her back in the manner indicated, complaining that a bolt had been hanging down, "a little long." (Tr. 1312.)

Nelson was next injured less than 2 months later, when her thumb was pinched by a plate while she was working on a conveyor belt on February 10, 2007. This accident was investigated by Supervisor Utter who prepared a report in which she observed that "[o]perator needs to be more careful, slow down and be aware of surroundings." (GC Exh. 63.) Nelson was unable to recall this injury during her testimony.

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On May 16, 2007, Nelson injured her elbow on two separate occasions. Supervisor Utter prepared the investigation report, noting that Nelson was instructed to "slow down, be aware of her surroundings." (GC Exh. 13.) The level of Utter's concern and exasperation over Nelson's pattern of accidents was well illustrated in this report. She was using a company form to prepare the document. That form asks, "What needs to be done to prevent this from recurring?" Her terse response was, "Fire her."⁷⁸ (GC Exh. 13.)

It will be recalled that Nelson was on light duty from June through October 2007. She was next injured on January 9, 2008. At that time, she was cleaning under a conveyor when she slipped on some dough. She suffered "small contusions to the right elbow, hip, and knee." (GC Exh. 14.) This accident was investigated by Supervisor Anderson and Safety Manager Gronczewski, who prepared reports. Anderson noted that the accident occurred when Nelson's feet became entangled in an air hose she was using.

Just 10 days later, Nelson suffered the final injury that led to her termination. Because this event figures prominently in the Employer's rationale, I will describe the evidence regarding

⁷⁸ It should be noted that Utter made this recommendation to terminate Nelson in May 2007. This was approximately a month after the Union had suffered an overwhelming defeat in the first election. All witnesses agreed that there was no union activity going on at this time. I have no doubt that Utter's opinion was a sincere expression of her level of concern regarding Nelson's propensity to injure herself on the shop floor, and nothing else.

it in more detail. The accident happened while Nelson and coworker, Melanie Johnson, were cleaning a roller under line zero. While Johnson had never performed this task before, Nelson testified that she had done so on two prior occasions.⁷⁹ This roller is 5 feet long and weighs 10-to-15 pounds. It requires two people to remove it from its position and replace it after cleaning.

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Nelson testified that she and Johnson removed the roller. Johnson then cleaned it. At this point, Nelson was "pushing the roller back over to go into position." (Tr. 1292.) When she did so, tension on the belt, "caused it to flip out and go down on the floor, and as it did that, when the other end went down, it came up and pinched my hand." (Tr. 1292.) She reported that the resulting injury was painful, but did not require medical treatment. Nelson reported the accident to Supervisor Anderson, who prepared the initial report. On cross-examination, Nelson conceded that in her pretrial affidavit she had reported that at the time of this accident, she had forgotten that the roller will pop off if the other operator is not right there on the other side of the conveyor, waiting for it to come over.

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Johnson also testified. It was apparent that, for understandable reasons, she wanted to be helpful to Nelson.⁸¹ She confirmed Nelson's account of how they disassembled the equipment and cleaned the roller. Although she also confirmed Nelson's account of how the accident happened, she did report that she could not actually see anything from her position on the other side of the equipment, except she did see the roller fall to the floor. Nelson told her that she was going to report the injury in case "she had to get medical attention." (Tr. 1515.)

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After the initial written report by Supervisor Anderson (in the record as GC Exh. 124), Safety Manager Gronczewski conducted a further investigation. He interviewed Nelson and Johnson. Nelson told him that she was attempting to put the roller back onto its support rods, when it slipped off and pinched her hand. Significantly, Gronczewski testified that Johnson gave him a more candid appraisal of how the accident happened. She told him that "she wasn't ready yet to actually grab that roller. She was preparing to get ready, and then Connie pushed it through, then that's when it fell off." (Tr. 423-424.) Gronczewski concluded that a precipitating cause of the accident was Nelson's failure to wait until Johnson was in position before attempting to replace the roller. As he explained in his report, "[w]itness says that Connie

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⁷⁹ Ironically, when Nelson had been on light duty in 2007 stemming from her knee injury, she was assigned to write a standard operating procedure for this very operation.

⁸⁰ Nelson was complying with the Employer's work rules by reporting the accident. Those rules require that "[a]ll injuries, regardless of how unimportant they may seem, are to be reported to your team leader/supervisor immediately." (GC Exh. 3(b), p. 29.)

⁸¹ As will be described shortly, part of Gronczewski's basis in concluding that the accident had been Nelson's fault stemmed from his interview of Johnson. Naturally, Johnson would be likely to feel regret about that.

pushed the roller through quickly. If Connie would have taken her time to line up the roller correctly and to do this job slower this incident would not have occurred."82 (GC Exh. 65.)

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Gronczewski reported that, as part of his examination of this event, he also reviewed Nelson's prior accidents. He added that "after Ms. Nelson's seventh accident, I became very deeply concerned for her safety . . . and I got to look back on all of her accident reports, and she had several accidents within a couple of month time period throughout that year. I became very concerned that Ms. Nelson's next accident could lead to a very serious injury or possible death." (Tr. 406.) Gronczewski reported his concern to HR Manager Slaughter, telling her that "I had a deep concern for Connie Nelson's safety . . . I believed that she was a hazard to herself or she could've been a hazard to somebody else." (Tr. 428.)

Slaughter testified that she conducted her own review of Nelson's history of accidents and a collaborative decision to terminate Nelson was reached among herself, Schleuss, Cahill, and Kantner. She testified that, among the considerations that was discussed was, "the pressure we had been receiving from our corporate office on reducing our injuries." (Tr. 160.) The deliberations also included consideration of Nelson's history of seven documented accidents in her relatively short period of employment and the fact that her behavior "had not improved even though she had been told these things numerous times." (Tr. 163.) Slaughter and the other decisionmakers also reported that Nelson's union activity had nothing to do with the decision.

On reaching their conclusion, Nelson was terminated. Slaughter met with her to explain the reason. She testified that she told Nelson, "she had seven injuries and had repeatedly shown that she was careless, and she was a risk to herself and we didn't want her to be injured anymore and we felt that it was best to terminate her employment." (Tr. 177.)

I conclude that the evidence reveals that the decision to terminate Nelson was a genuine and sincere response to her record of safety problems and injuries. That record is both extraordinarily long for a relatively short-tenured employee and impressively documented as events were unfolding. I also credit the evidence regarding the context of increased emphasis on safety issues. Even Nelson confirmed in her testimony that, at the time she was discharged in January 2008, the Employer was "really starting to crack down on accidents." (Tr. 1325.) [Counsel for the Employer's words.]

Admittedly, the new emphasis on safety enforcement did result in new disciplinary procedures. Gronczewski testified that he and the human resources department would decide when an employee had engaged in repetitive and excessive safety violations that required termination. He noted that this was not a mathematical calculation, but was examined on a

⁸² In another contemporaneous email to Schleuss and Cahill, Gronczewski characterized the cause of Nelson's injury as arising from her "push[ing] the roller onto the support rods . . . quickly instead of slowly and cautiously." (GC Exh. 58.)

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"case-by-case basis." (Tr. 439.) Thus, while the record contains numerous disciplinary reports for safety violations, the Employer cannot point to a prior case where it discharged an employee based on a pattern of repetitive and excessive safety violations.

I grasp that this inability to point to precedents fuels the General Counsel's suspicions here. In addition, the General Counsel's anxiety is heightened because the termination of Nelson roughly coincided with the resumption of organizing activity. As to the first cause of concern, the Board is clear in holding that unprecedented misconduct often calls for an unprecedented response. Thus, the Board explained in *St. George Warehouse*, 349 NLRB 870, 879 (2007), "[a] particular form of discipline is not necessarily unlawful solely because an employer has imposed it for the first time. Here, because [the employee's] conduct was unprecedented, there are no similarly-situated employees with whom to compare him. Therefore, the record does not support a finding of disparate treatment."

By the same token, Nelson's history of seven documented industrial accidents in the space of 16 months was unprecedented.⁸³ Beyond this, the record shows that she was repeatedly warned about her behavior. Furthermore, a pattern of particular problems was manifest throughout the investigative reports. Her injuries were caused by a combination of inattentiveness to her surroundings and excessive haste. Although repeatedly warned, she was unable to alter the pattern.⁸⁴ The Employer did not leap to rid itself of her. She was given opportunities to improve. An earlier supervisory recommendation that she be fired was not carried out. Only when the pattern continued and the managers became more focused on the safety issue was she terminated.

This brings up the second cause for concern, the issue of timing. I recognize that Nelson and some other employees were terminated as of the commencement of the second organizing campaign. However, one cannot view this in isolation. At the same moment, management was under increased pressure to curb safety problems. Also at the same moment, January 2008, Nelson became involved in two new industrial accidents in rapid succession. The situation mirrors that described in *Frierson Building Supply Co.*, 328 NLRB 1023, 1024 (1999), where the Board assessed the following issue of timing, "[s]hortly after the union campaign, [an employee's] unsatisfactory work performance came to the new personnel manager's attention. The personnel manager's review revealed a longstanding performance problem with [the

⁸³ In fact, I found it interesting that the Employer always referred to Nelson's history as showing seven work accidents. This overlooked the fact that the incident on May 16, 2007, involved two separate elbow injuries. The Employer would have been justified in claiming that Nelson was involved in eight accidents.

⁸⁴ I wish to be careful here in not leaving the impression that I view Nelson's behavior as exhibiting some sort of moral deficiency. The fact is that not all people are suited for industrial work. The hazardous environment is not for everyone. Nelson's inability to make the required adjustments does not display any fault of character.

employee's] work, and the personnel manager decided to discharge [him]." The Board concluded that "the circumstances in this case do not warrant inferring animus based on timing alone." 328 NLRB at 1024. The same is true here. I am left with the firm conviction that the genuine and sincere reason for Nelson's discharge was the confluence of her recidivist history of safety violations and the Employer's new focus on eliminating those behaviors. In other words, Nelson would have been terminated for her safety violations regardless of her union support and activities. The Employer has carried its burden in this regard.

d. Christina Duvall

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The next controversy also involves the contention that the Employer discharged an employee, Christina Duvall, in response to her protected union activities and a countervailing claim that Duvall was discharged for safety violations. (GC Exh. 1(j), par. 19.) While the two employees' work histories were somewhat different, I have concluded that the motivational analysis yields the same result.

At the first *Wright Line* step, Organizer Price testified that Duvall was among the members of the organizing committee for the first campaign in 2006. Robinson reported that, as to the second campaign, Duvall was more active than him. Price confirmed that she was again an active proponent of the Union. She signed an authorization card on January 16, 2008. (GC Exh. 108.) There is no doubt that Duvall participated in protected union activities.

The evidence is also rather clear that management became aware of Duvall's union support. One particular instance is well documented. In March 2007, Duvall was suspended for the workplace offense of "insubordination," arising from her refusal to attend a one-on-one meeting with her supervisor, James Sampson. (R. Exh. 35.) The purpose of the meeting was to discuss performance and conduct issues. Duvall refused to meet with him, stating that she did not feel "comfortable" going into a room with Sampson. (R. Exh. 34.) Duvall sought the Union's assistance regarding her suspension.

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The Union did raise the issue at the meeting held with company officials on March 16, 2007, as reflected in the minutes of that meeting which included the notation that there had been "[d]iscussions regarding Christina Devual [sic]." (GC Exh. 85, p. 2.) Duvall reported that, as a result of the Union's intervention, her suspension was reversed. Duvall testified that Union Representative Joe Sardino told her that "they had contacted Ray Baxter, who is the president and CEO of Interbake, and I don't want to use the term threatened, but that they had used filing charges against them as leverage to [obtain reversal of her suspension]." (Tr. 1684.)

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Duvall also testified that she engaged in conversation with union representatives who had been allowed to set up a table inside the facility prior to the first election. She reported that managers had observed this. In addition, she testified that during the 2008 campaign, she attempted to engage in discussions of the Union with Supervisor Anderson, but Anderson told her that "she wasn't allowed to speak about it" with Duvall. (Tr. 1690.) I readily conclude that management knew that Duvall was an active union supporter.

As to the presence of unlawful animus, there is no evidence of such animus specifically directed towards Duvall. The General Counsel argues that a finding of animus should be premised on two factors. The first of these concerns his view that the Employer's conduct in discharging Duvall raises inferences of unlawful motivation. The second factor is the existence of a variety of unfair labor practices committed by the Company's supervisors over the course of the two organizing campaigns. As to the first factor, I reject the proffered inferences because I conclude that Duvall's discharge was based on legitimate motives as I will shortly explain. However, I concur that the second factor is present and that it minimally meets the General Counsel's burden.

It is now necessary to evaluate the Employer's explanations for the decision to terminate Duvall's employment and the evidence in support of those explanations. Perhaps the most succinct statement of the Company's rationale was provided by Schleuss, who testified that he was involved in the decision to discharge Duvall and that she was discharged due to her involvement in "[m]ultiple unsafe acts." (Tr. 3023.) As this suggests, it is necessary to examine Duvall's entire work history and then, ultimately, to focus on the precipitating event cited by the Employer as justification for its adverse action against her. That event was an industrial accident on February 8, 2008, that injured Duvall's hand.

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Duvall began working at Interbake in August 2006. At the time of her discharge, she was a machine operator on line 1 during the third shift. Anderson and Utter were the supervisors on this shift. Duvall reported that she was a very experienced operator, having acquired great familiarity with the rather unusual machinery on line 1. She explained that line 1 contained older production equipment and did not include the removable knife blades found on newer machines used on other production lines. Duvall testified that, in September 2007, she had been assigned the task of drafting standard operating procedures for line 1, "because I had more experience." (Tr. 1662.)

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While Duvall was a rather long-term employee by the standards of this newly-opened facility, her personnel records reveal a variety of issues regarding her work performance, conduct, and adherence to safety requirements. In the second month of her employment, on September 26, 2006, Duvall suffered abrasions to her left arm when she caught her sleeve in the machinery while reaching across a roller. Henline prepared a report about this incident and observed that it would be necessary for operators to pay attention and be aware of pinch points. (R. Exh. 36.) Duvall confirmed the occurrence of this event in her testimony.

On February 7, 2007, Duvall cut the tip of her middle finger while cleaning a machine guard. This was problematic since she had not been wearing Kevlar gloves at the time.

Supervisor Utter issued her a pair of such gloves and instructed her that "all operators must wear gloves when changing guards and cleaning knives." (GC Exh. 69, p. 1.) Duvall testified that, at this time, she told Utter, "I had not been informed of that." (Tr. 1693.) In a comment on Utter's draft report, Gronczewski requested that Utter, "[p]lease tell the employee that it is her

responsibility to ask for gloves Also let her know that this issue was discussed at a communication meeting that we had a record of." (GC Exh. 69, p. 2.)

A rather dramatic episode occurred on April 26, 2007, when Duvall was in the locker room and began vomiting. A coworker went to assist her and Duvall then passed out in her arms. She was unresponsive for at least 15 minutes and had to be transported for medical care by ambulance. Utter prepared an investigatory report regarding this event and indicated that Duvall's difficulties resulted from her consumption of caffeine pills. Utter opined that use of these pills, "is unsafe not only for the body but as an operator it is unsafe to run a machine." (R. Exh. 37.) In her testimony, Duvall denied having taken caffeine pills. However, her account was not credible, as she professed an inability to recall virtually anything about this significant event. She capped her testimony regarding the matter by stating, "[A]s to what happened in the locker room, I honestly do not recall." (Tr. 1728.)

Three months later, Duvall again cut her finger while cleaning equipment. She had been cleaning "the knife under the gauge roller" while "not wearing her gloves." (GC Exh. 68.)

Utter's investigative report goes on to note that Duvall defended her failure to wear gloves by complaining that she had been on sick leave and, on her return, her gloves were missing. Utter observed, however, that "[w]hen she returned, she had not asked for any new gloves." (GC Exh. 68.)

Two months after Duvall's second finger injury, she was disciplined for an unquestionably severe instance of workplace misconduct. This was documented in a disciplinary notice issued to Duvall by Supervisor Sampson on September 26, 2007. Sampson reported that Duvall had been "found sitting on a table at Line 1 sleeping." (R. Exh. 39.) Sampson noted that this offense was not only a misuse of worktime, but as it took place on the production floor, was also "an unsafe act and a deliberate violation of our safety rules." (R. Exh. 39.) In language that relates directly to the matters at issue here, Sampson warned Duvall that "[f]uture incidents of unsafe acts could result in further corrective action up to and including termination." (R. Exh. 39.)

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On January 9, 2008, Duvall was injured when she tripped or slipped while climbing out from under a conveyor belt. She suffered small contusions to her elbow, hip, and knee. The incident was documented by Safety Manager Gronczewski. (GC Exh. 64.)

⁸⁵ I credit Utter's contemporaneous report and note that it is given inferential support by the fact that Duvall was cited for sleeping on the job several months later.

⁸⁶ Indeed, I find the leniency of the disciplinary response to Duvall's gross misconduct in this incident to be yet another example of the Employer's general forbearance.

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A month later, Duvall was seriously injured when she cut her hand on a knife blade while not wearing gloves. Because this episode led to her termination, it is necessary to examine it in detail. Duvall testified that, on this occasion, she was cleaning the machines along with two coworkers. She noted that these two were new to this process, but that she was the employee who "cleaned the machine most of the time." (Tr. 1666.) Part of the cleaning process involved the need to remove accumulated dough. Duvall explained that one of the worst places to clean this buildup was "around the knives at the compression rollers." (Tr. 1666.) She described, "reaching with my left hand down into the machine to grab the dough from inside the machine and pull it out." (Tr. 1667.) Unfortunately, "when I pulled my hand back out, I felt something and I dropped the dough, and I looked at my hand, and I have a U-shaped cut on the back of my left index finger." (Tr. 1668.) Although she was not cleaning the knife blade itself, she had been cut by that blade when reaching in to remove the dough. She was not wearing gloves at the time.

Company policy provides that "[a]ll injuries, regardless of how unimportant they may seem, are to be reported to your team leader/supervisor immediately." (GC Exh. 3(b), p. 29.) Despite this, Duvall testified that she chose not to report the cut. She simply put a bandaid on it and resumed working. About an hour later, she bumped the injured finger on a roller and "it really opened up and started bleeding badly." (Tr. 1672.)

At this, Duvall testified that she told a coworker about her injury and he took her for first aid. Ultimately, she passed out and was taken by ambulance to the hospital, where she received four stitches. On her return from the hospital, she reported to the supervisors, who were in the process of investigating the event. They asked her what had happened and whether she had been wearing gloves. They also asked her to undergo a drug screening, but she refused.⁸⁸ She was sent home due to her medical condition.

Duvall's behavior after her return to the plant from the hospital was unusual. I agree with counsel for the Employer who argues that it reflects her consciousness that she had engaged in another unsafe act of the type she had been warned could lead to her termination. Thus, Duvall testified that before meeting with her supervisors, she went into the locker room and spoke with a coworker named Louisa. She told Louisa, "I didn't think I was going to be coming back, that I had already cleaned out my locker and told her it was nice working with her." (Tr. 1674.)

⁸⁷ Duvall's testimony as to this event provides a striking illustration of the rationale for the Company's policy of requiring immediate reports of all injuries, no matter how minor. Had Duvall complied with the policy, it is likely that she would not have reinjured her finger and that the Employer would not have confronted a situation where a food production worker on the production line was now "bleeding badly," a circumstance filled with potential risks for the Company and the public who consumed its products.

⁸⁸ Three days later, Duvall did have the drug screening. Unsurprisingly, it was negative.

There were serious inconsistencies in Duvall's account of the incident and her attempted defense of her conduct. She asserted that wearing the Kevlar gloves was not required to perform the sort of cleaning around the knives that had led to her injury. Her position was reflected in the following exchange on cross-examination:

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COUNSEL: [Y]ou were actually reaching barehanded next to the knife, to pull dough that was stuck in the machine, is that correct?

DUVALL: Yes.

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COUNSEL: So you were working right next to the knife, and you didn't believe that you should be wearing the Kevlar gloves, is that your testimony?

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DUVALL: That's right.

(Tr. 1732.) Strikingly, on redirect, her testimony shifted in a dramatic manner. The exchange went as follows:

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DUVALL: [T]here were a couple of occasions where there was some buildup behind [the knives], and I did take a scraper and scrape out behind them.

GC:

And on those occasions, would you wear your Kevlar gloves?

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DUVALL: Yes.

(Tr. 1754.) In a manner familiar to any experienced trial lawyer, at this moment, counsel for the General Counsel abruptly changed the subject.⁸⁹

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In order to shed more light on Duvall's unusual behavior on the night of her injury, the Employer produced the testimony of a coworker, Debra Morrow. Morrow reported that she was also a machine operator on the same shift. On the day of Duvall's injury, Morrow encountered her in the rest room. She saw Duvall take off her latex glove and remove two bandaids. She

⁸⁹ It is fair to say that Duvall posed a number of problems for the counsel for the General Counsel. In an instance cited by the Employer as a clear example of Duvall's credibility problems, she conceded under cross-examination that in the affidavit she provided while the matter was under investigation, she neglected to tell counsel for the General Counsel that she had been involved in two prior episodes where she was criticized for failing to wear Kevlar gloves around the knives resulting in cuts to her fingers. She admitted that her affidavit had been "incorrect" as to this important matter. (Tr. 1710.)

showed Morrow her injury and told her that "she couldn't get it to stop bleeding." (Tr. 3334.) Morrow observed the cut and reported that it looked deep and was bleeding.

Morrow testified that Duvall told her that she had not reported the injury to a supervisor. Morrow urged her to do so "[b]ecause I thought it looked deep enough somebody needed to look at it." (Tr. 3335.) Duvall responded that she was afraid to report the injury because she thought "she'd lose her job." (Tr. 3335.)

Later that night, Morrow again encountered Duvall. At that time, Duvall was removing her personal tools from the toolbox. She explained to Morrow that she was taking them because "she was afraid she might not be back." (Tr. 3336.)

Subsequent to the events of February 8, Supervisor Kathy Madigan sent an email to seven management officials regarding Duvall's situation. These included Slaughter and Gronczewski. Madigan noted that Duvall had been injured by a knife cut while not wearing Kevlar gloves. She had failed to report the injury and eventually needed hospital treatment for it. Madigan then provided a brief description of four prior injuries suffered by Duvall, including the two prior knife cuts to her fingers. Madigan concluded her email by informing her superiors that "[w]ith all the above accidents, we [line supervisors] hope she doesn't return, we feel she is unsafe. Jill—please let me know your decision so I can have a plan of coverage in machining if she will not be returning." (R. Exh. 85.)

Not surprisingly, an investigation was conducted. Duvall was placed on suspension while this was underway. As to his own conclusion, Safety Manager Gronczewski testified that "Ms. Duvall was told numerous times to wear her gloves, and she failed to do so, and once again, I was very fearful that if somebody's being told that by their direct manager to do something to make themselves safe and if they got hurt twice because they didn't do that, I was very concerned that that employee would break another safety rule and become injured even worse." (Tr. 441.)

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Slaughter testified that the final decision to terminate Duvall was made by Schleuss and herself as of February 14, 2008. The rationale for her termination was her "failure to follow safety procedures." (Tr. 172.) Slaughter asserted that the two managers never discussed Duvall's union activities and that those activities played no role in the decision. Slaughter notified Duvall of her termination by telephone.

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⁹⁰ Duvall was not interviewed as part of this investigation. The General Counsel finds this to be an indicator of pretext. I do not agree. Duvall had been interviewed by Anderson and Utter after she returned from the hospital. Furthermore, the Board has observed that an interview "is not the sine qua non of an adequate investigation." *J.J. Cassone Bakery*, 350 NLRB 86, 88 (2007), enf. 554 F.3d 1041 (D.C. Cir. 2009). In this case, the investigation involved careful examination of Duvall's employment history and the circumstances of her latest injury, including the failure to promptly report it.

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In assessing the legitimacy of the Employer's asserted rationale for Duvall's termination, I begin by noting the similarities to Nelson's discharge less than a month before. While this strikes the General Counsel as suspicious, I have already detailed my reasons for concluding otherwise. Like Nelson, Duvall's discharge came after a long and troubling history of industrial accidents and injuries and in the immediate context of recent and intensive pressure on managers to improve the plant's safety record.

Comparison of Nelson and Duvall's work records is illuminating. Nelson was terminated after her seventh work accident. Duvall was terminated after the same history, consisting of seven separate work incidents involving safety infractions. I have already noted that Nelson's pattern of accidents and injuries did not give rise to any conclusion that she was morally culpable; merely that she was ill-suited to work in a dangerous environment. The same cannot be said of Duvall's work history. It was clear that her conduct raised troubling issues of culpability that would concern any reasonable employer. These included sleeping on the production floor, passing out at work due to ingestion of caffeine pills, and deliberately choosing to violate the rule requiring immediate reports of injuries with the result that she remained on the production floor while actively bleeding. Careful review of Duvall's entire record provides strong support for the legitimacy of the Employer's claim that she was terminated for a pattern of safety infractions of a severe nature.

In vigorously arguing the contrary, the General Counsel focuses almost exclusively on the circumstances at the moment Duvall cut herself on February 8. I recognize that there is some ambiguity in the evidence as to whether there was a specific and firm work rule about wearing Kevlar gloves while engaging in the precise task that caused Duvall's injury. While fairminded persons could disagree about the level of proof, I do note that Duvall conceded that she had worn the gloves in the past when engaged in similar activity. More importantly, I conclude that an overemphasis on this specific incident mischaracterizes the Employer's rationale. It was this event, combined with Duvall's prior history and grossly improper subsequent behavior that led to her termination. As I stressed at the very beginning of this decision, I part company with the General Counsel because I conclude that the Board requires a wide scope of review of contested conduct, a review that gives proper weight to the entire context, not merely an isolated event coupled with the existence of some union activity.

I have also considered the General Counsel's argument that the evidence shows disparate treatment because other employees have been given lesser forms of discipline for safety

⁹¹ For instance, GC Exh. 107 is a training slide that discusses use of Kevlar gloves only in connection with the cleaning of knives. Of course, a training slide is not necessarily a fully inclusive statement of a work policy. In any event, as the Board has put it, "[t]he Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it." *Merilllat Industries*, 307 NLRB 1301, 1303 (1992).

violations. I agree that employees engaged in a broad variety of such misdeeds and accidents and were often issued written warnings as a result. Such a management response was reflective of a policy that I have already described as being rather tolerant and forgiving. I do not think this evidence establishes disparate treatment.

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In the first place, the Employer has presented strong evidence in support of the contention that this policy as to safety issues was undergoing a transformation. As I have mentioned, the Board has recently assessed a very similar issue in Dish Network Corp., 359 NLRB No. 108 (2013). In that case, the Board affirmed the judge's dismissal of a claim that the leading union negotiator was discharged for the pretextual reason that he had "disregarded safety policies on numerous occasions." 359 NLRB No. 108, slip op. at 1. The trial judge had found that the workplace had been performing poorly. As a result, management began a remedial campaign that included a focus on safety as a top priority. The employer's performance improved dramatically. The same thing happened at Interbake. In fact, Schleuss testified that the Employer reduced reportable injuries from 34-35 in 2007 to just 17 in 2008. This provides vital context.

Beyond this, the issuance of warnings to employees for other safety violations does not undermine the legitimacy of the discharges of Nelson and Duvall. They had extraordinarily long histories of safety problems. Those histories showed a recidivist pattern of dangerous conduct that gave rise to a reasonable apprehension that sooner or later something very bad was going to happen with severe consequences for the Employer. Both employees were given multiple chances to improve and specific recommendations as to how to do so. In Duvall's case, there was also evidence of intentional misbehavior. I have already noted the Board's entirely logical conclusion that unprecedented levels of misconduct will be likely to produce an unprecedented level of supervisory response. This is not a suspicious circumstance. Such is the situation here.

I conclude that the Employer discharged Duvall due to her lengthy record of safety infractions, injuries, and documented episodes of safety-related intentional misconduct. Coming in the midst of its heightened emphasis on improvement in workplace safety, the decision would have been taken regardless of Duvall's involvement in protected union activities.

e. Milo Malcomb

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While Nelson and Duvall were lawfully discharged for a pattern of safety violations, the next two instances of allegedly unlawful discharge of employees, namely Milo Malcomb and Clyde Stovall, also involve the issue of workplace safety. However, these situations differ from those just discussed because the Employer defends each of these discharges as having been required by its zero tolerance policy for lock out/ tag out violations. As a result, it is necessary to focus the analyses of these discharges on the specific incidents cited by the Employer as requiring such action under the policy.

The first issue concerns the suspension of Milo Malcomb on February 23, 2008, and his discharge on February 27, 2008. The General Counsel contends that these personnel actions

were motivated by unlawful animus against Malcomb due to his union support and activities. The Employer defends by asserting that it had no knowledge of any protected union activity by Malcomb and it took adverse action against him solely due to his violation of its zero tolerance policy for failure to lock out equipment before performing maintenance on it.

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Malcolm was hired by Interbake in April 2007. He was a maintenance technician assigned to the third shift. His supervisor was Dan Murray. However, during the events at issue, Murray was on sick leave. Jim Clarke served as the maintenance supervisor in Murray's absence. The parties stipulated as to Clarke's supervisory status during periods when Murray was absent. (See Tr. 2587.)

At the first step of the *Wright Line* analysis, it is indisputable that Malcomb signed a union authorization card. That card, bearing the date of January 10, 2008, is in the record as General Counsel's Exhibit 102. At this juncture, however, it must be noted that the General Counsel presented some peculiar testimony regarding the timing and circumstances involved in Malcolm's execution of a union authorization card. Union supporter Janice Reese explained that she had given Malcomb union cards in the past, but he had never signed them. She also reported that Malcomb did sign such a card "the same night" he became involved in the incident that led to his termination, the night of February 21. (Tr. 1567.) He explained to her that he was tired of "being cussed out every night," and, having just signed the authorization card, "he said, I'm protected now." (Tr. 1568.) It is difficult to know what to make of all this. It certainly leaves the impression that Malcomb was a latecomer to the organizing effort.

As to his union activities beyond the signing of a card, Malcomb testified that he spoke to many coworkers about the Union. He attended the union meeting held on February 26, a date which was after his suspension and one day before his termination. Organizer Price reported that Malcomb engaged in open union activities such as handbilling, but this open involvement was subsequent to his suspension. While there is considerable confusion in the record regarding the nature and timing of Malcomb's decision to support the Union, I do conclude that the General Counsel has carried his burden of establishing some degree of protected activity by Malcomb prior to the adverse actions involved in this case.

At the next step, it is essential that the General Counsel prove that the Employer knew about Malcomb's union activities, or at least, his union sympathies. While I have found that the evidence was scant, albeit barely sufficient, regarding the Employer's knowledge of other alleged discriminatees' involvement with the Union, I cannot discern even that level of proof as to Malcomb. The Employer's witnesses were clear and consistent in asserting that they were completely unaware of Malcomb's union support. There was general agreement among the

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⁹² Union supporters Jones and Connie Runion testified that Malcomb did speak to coworkers in favor of the Union. Employee Morrow, a witness for the Employer, testified that when he talked to her about the Union, he was opposed to it.

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witnesses from both sides that the maintenance department had been known to be antiunion in the past.

Malcomb, himself, provided testimony under cross-examination that tended to support management's professions of ignorance as to his views and activities. He reported that he had been careful to be sure there were no managers present when he engaged in discussions with coworkers about the Union. He conceded that he had "no idea" if any manager had ever overheard such a discussion. (Tr. 1448.) He also testified that he never told any member of management that he supported the Union. Union supporters, Connie Runion and Melissa Jones, both claimed that Malcomb was vocal in support of the Union, but both agreed that they could not cite to any instance when a manager would have heard such statements by Malcomb.

Quite logically, the Board does not limit the scope of its inquiry as to an employer's knowledge of employees' union activities to direct evidence. This is significant here, because there is no such direct evidence of any knowledge by management of Malcomb's prounion stance. As to circumstantial evidence, in appropriate situations the Board will rely on an employer's general knowledge of employees' union activity, timing, animus, disparate treatment, and lack of reasonableness of discipline imposed to support an inference of knowledge.

Montgomery Ward & Co., 316 NLRB 1248, 1253 (1995), enf. 97 F.3d 1448 (4th Cir. 1996).

None of those factors will avail the General Counsel here.

As to the Employer's overall knowledge of union activity, this was clearly present at the time of Malcomb's suspension and discharge. However, as I have indicated, there was uncontroverted testimony that, generally speaking, people throughout the plant on both sides of the issue thought that the maintenance department was a stronghold of antiunion sentiment. The timing of Malcomb's discipline cannot assist the General Counsel here. As will be discussed, the key event that set in motion the suspension and discipline of Malcomb was a report about his misconduct made by one of the Company's production employees. There is strong evidence as to that employee's motives, none of which involved the Union in any way. Thus, the timing had nothing to do with any volitional act on the part of management. While I have noted that animus was present in this case, it took the form of statements and acts calculated to interfere with the Union's organizing efforts. It never rose to the level of causing the discipline of any employee, let alone the discharge of such an employee.

As to the remaining two factors cited in *Montgomery Ward*, supra, disparate treatment did not exist. The evidence shows that the Employer had previously altered its disciplinary policy regarding the workplace offense committed by Malcomb. It announced that new policy in a variety of very public ways. It then fired an employee pursuant to the new policy. There is no allegation that the fired employee was in any way involved with the Union. Only after this history was Malcomb terminated under the terms of the same policy. There was no disparate treatment. Similarly, the Employer has demonstrated that its conduct toward Malcomb was reasonable. After receiving a report from an employee who stated that she had observed Malcomb engaging in dangerous misconduct, the Employer conducted a careful investigation, including numerous interviews with persons who may have had direct knowledge of the event.

Substantial evidence of such misconduct was found and it was demonstrated that the Employer's concern about that misconduct was the motivation for Malcomb's discharge.

In sum, although the record is barren of any direct evidence of management's knowledge of Malcomb's union activity and support, I have carefully examined the circumstantial evidence. Nothing in these circumstances gives rise to any inference that management knew of Malcomb's union support. On the record as a whole, I conclude that the consistent testimony about the lack of such knowledge by the managers who were involved in Malcomb's suspension and discharge is credible. In consequence, the General Counsel has failed to carry his initial burden as to Malcomb.

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Ordinarily, the analysis should cease once this conclusion has been reached. I have elected to continue the *Wright Line* assessment for two reasons. In the first place, as I have indicated, much of the evaluation of the circumstantial evidence as to the issue of knowledge turns on the sincerity of the Employer's rationale for its conduct towards Malcomb. Detailed consideration of that evidence is typically performed at the final *Wright Line* step. Secondly, in a case as lengthy as this one, involving great expenditure of resources by all parties, the interest in decisional completeness is very strong. In order to avoid leaving a gap in the record, I deem it appropriate to articulate my evaluation of the Employer's defense at the last *Wright Line* step. For these reasons, I will now proceed on the assumption (albeit an unjustified one), that the General Counsel met his burden of showing the Employer's knowledge of Malcomb's union support and activity.

As with other instances of alleged unlawful discrimination in this case, I conclude that the General Counsel has presented minimally sufficient evidence of animus by proving a number of violations of Section 8(a)(1) that were designed to interfere with the exercise of protected rights by its employees. Thus, the burden now shifts to the Employer to demonstrate that it had a legitimate reason to discharge Malcomb and that it did discharge Malcomb for that reason. In making this determination, it is necessary to review the facts involved in detail.

Malcomb testified that, on February 21, he was on duty in the maintenance department. They received a call regarding a belt that was off track on line 5. Malcomb and three other maintenance technicians responded to the call. The others were Mike Helminski, Charles Greathouse, and Jerry Rickard. As one would expect, their efforts were initially focused on diagnosing the problem by observing the operation of the machinery. Greathouse suggested that the misalignment was being caused by a problem with the drive roller. Malcomb speculated that it was a bad bearing in that roller. He testified that he crawled to the backside of the equipment with a wrench in his hand. He reported that he used the wrench to tap the roller twice. When he did this, debris that had been affixed to the roller fell off. This solved the problem. Malcomb

It is clear that this episode came to the attention of Safety Manager Gronczewski through a report from an employee, Louisa Robinson. In a contemporaneous email from Gronczewski to Slaughter, he stated that Robinson told him that "she saw Milo Malcomb under a conveyor belt

testified that the equipment had been operating throughout this event.

near the line 5 dumping station . . . scraping and banging on a roller as it was in motion with a wrench." (GC Exh. 27.) In his testimony, Gronczewski reported that Robinson told him about it, because "she was concerned about something to where someone's going to get hurt." (Tr. 3229.)

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Because this sequence of events is so important in undergirding the genuineness of management's subsequent behavior, it is important to assess Louisa Robinson's motivation. There is no evidence that she was motivated in any way by something connected to the Union. Nor is there any evidence that she was motivated by any personal dislike of Malcomb.

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The evidence shows that Robinson had two motives, one lofty and the other base. Her first motive was her great concern about the potential for severe injury arising from the act of banging or scraping a moving roller. She had been a witness to such an injury to a coworker, Heather Anderson, and did not want to see a repeat incident. Her second motivation was monetary. She was hopeful that her report of Malcomb's misconduct would give her an opportunity to earn a \$500 bonus under the Company's new safety recognition program. Whether one chooses to view Robinson as a hero or a snitch, one thing is apparent. Malcomb's union support or activity had nothing to do with the manner in which management became aware of Malcomb's behavior that night.

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There is no dispute that the event described by Robinson in her report to Gronczewski was a very serious safety violation. Maintenance technician Rickard testified that, if Malcomb had scraped a roller while it was running, "that was termination right there." (Tr. 2652.) This would have been required under the Employer's zero tolerance policy for lock out violations. Beyond that, Rickard also acknowledged the rationale for the policy, observing that "all of us in maintenance know we're not supposed to do that, you know, because we've seen injuries occur from that." (Tr. 2618.)

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In his own testimony, Malcomb also confirmed the existence of the zero tolerance policy for lock out violations and the importance attached by management to that policy. He had the following exchange with counsel for the Employer:

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COUNSEL: [C]ertainly by December 2007 then, with this heightened emphasis on the lock out/tag out policy, the company really was cracking down to try to prevent employee injuries from lock out/tag out violations?

⁹³ In another example of the extensive corroboration of the Employer's defenses in this case, the record contains the Company's announcement of this program, dated February 1, 2008. (GC Exh. 40.) In fact, the documentary evidence also contains an email exchange that notes that Robinson was disgruntled when she did not receive the bonus payment. In her anger, she threatened to stop reporting safety violations in the future. (GC Exh. 30.)

MALCOMB: Yes.

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(Tr. 1457.) Malcomb also conceded that scraping a moving roller was a violation of the zero tolerance policy and that he knew of two instances where employees had been seriously injured while scraping moving rollers.

Having received a report of a lockout violation, the safety manager proceeded to investigate. He first examined the roller in question. He noted that it contained debris consisting of "salt, oil, dough," that had impacted "pretty hard." (Tr. 473.) It was reasonable to deduce that Malcomb would have observed the same problem and concluded that removal of some of this impacted debris would restore proper operation of the line. In this connection, I would observe that it appears clear that the issue is not whether Malcomb was correct in banging or scraping the roller to dislodge debris. It is apparent that he had, in fact, accurately determined the nature of the problem and the proper solution to it. The only real issue is that, under the lock out policy, he should have first stopped the operation of the machine and placed his lock and tag on the power source before clearing the debris.

After inspecting the scene, Gronczewski sought out Malcomb for an interview. Evidently word travelled fast as Malcomb testified that he was told that Gronczewski was looking for him. Greathouse told him that "somebody turned you in for scraping the belt . . . scraping the roller." (Tr. 1381-1382.) At this, Gronczewski appeared and instructed Malcomb to go into Clarke's office for a meeting. Malcomb opined that Gronczewski appeared to be angry.

All three men testified regarding the contents of this meeting. Malcomb reported that Gronczewski asked him if he had been scraping a roller. He denied it. Gronczewski challenged him, telling him that "[y]ou were seen by somebody." (Tr. 1383.) He again denied it, stating that "I tapped on the roller and a little bit of debris fell off on the floor." (Tr. 1383.) Gronczewski took the position that this was a distinction without a difference. He told 30 Malcomb, if he had tapped the roller, "then you was scraping the roller." (Tr. 1383.)

Malcomb then gave the two supervisors a demonstration of what he had done. He testified that Clarke agreed with Gronczewski that this had been a scraping of the roller. Next, however, Malcomb said just the opposite, contending that Clarke now defended him. On hearing that Clarke thought Malcomb had done nothing wrong, Gronczewski complained that he was not getting Clarke's support but would bring the matter up with Murray on his return. He predicted that Murray "will back me up on it." (Tr. 1384.) At this point, Gronczewski suspended Malcomb for scraping the roller. When Malcomb questioned this, Gronczewski elaborated that the suspension was "for lock out/tag out." (Tr. 1384.)

Gronczewski's testimony differed significantly from Malcomb's version. He agreed that he began the meeting by telling Malcomb that "it was reported that he was scraping a roller as it was moving." (Tr. 3329.) Understandably, Malcomb wanted to know who told him and Gronczewski refused to say. Gronczewski testified that Malcomb then "did admit to scraping

that roller." (Tr. 3230.) When it was pointed out to him that this was a lock out/tag out violation, he grew upset. Realizing the implications, he stated that he had a family to support. He then altered his position, explaining that he had merely "been tapping on the roller." (Tr. 3231.) He proceeded to demonstrate what he had done. He did concede that he could have shut down the machine before taking any action with the wrench.

Clarke's testimony about this meeting was perhaps the most dramatic and detailed. He explained that he was summoned to the meeting because he was acting as the maintenance supervisor due to Murray's illness. Gronczewski began the discussion by telling Malcomb that "it was brought to my attention that night that Milo was scraping the roller while it was running." (Tr. 3412-3413.) Clarke testified that Malcomb responded, "[Y]eah, I was scraping the roller because the belt was tracking off because of a dough buildup on the roller." (Tr. 3413.) He explained that he chose not to shut down the belt since he did not want to interfere with production. Gronczewski then observed that this was a lock out violation. Clarke reported that, as Malcomb listened to this, he "thought about it for a second, and his whole demeanor changed. One of the first things he said was you're not going to fire me, are you?" (Tr. 3413.) At that point, he contended that "I wasn't really scraping the roller, I was just hitting it." (Tr. 3413.) Clarke says he told Malcomb that was just as bad. At the conclusion of the meeting, Gronczewski suspended Malcomb.

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While the witnesses agree on the general course of their discussion, they part company as to certain key aspects. I credit the clear and consistent testimony of the two supervisors. It is also consistent with Robinson's original report of Malcomb's behavior. I note that it really matters very little whether one accepted Malcomb's own account. It is difficult to perceive why hitting or tapping the moving roller would not also be a lock out violation. At best, hitting or tapping the roller would involve less time in contact with the moving part. While this might decrease the quantity of danger, it would certainly not eliminate it. The fact remains that Malcomb placed his wrench in contact with a moving roller in violation of the zero tolerance policy. Had Malcomb simply taken the time to shut off the equipment and lock it out, there would have been no issue. His failure to do so led directly to his discharge.

Subsequently, Malcomb met with Slaughter. He (correctly) speculated to her that someone had informed against him in order to get "recognition" under the Company's new program. In a later conversation with her, he explained that he had "tapped the roller" and believed this had been safe because he did so at a place that was not near the pinch point. (Tr. 235.) After conclusion of the investigation of the incident, Slaughter prepared the termination

⁹⁴ It should also be noted that Clarke opined that Malcomb's conduct was a lock out violation regardless of whether he had scraped, banged, or tapped the moving roller. Clarke also pointed out that he had never seen a maintenance employee bang or scrape a roller without first locking it out. He also testified that shortly after the events, he discussed the matter with Slaughter, telling her that Malcomb "had said that he scraped it while it was running, he came right out and said it." (Tr. 3417.)

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notice which stated that Malcomb was discharged for "failure to lock out equipment." (GC Exh. 29.)

It is now necessary to examine the broader context regarding the Employer's policies and practices as to the lock out issue in order to determine whether they raise any suspicion that Malcomb was singled out for disciplinary sanction. It is clear that the Employer has always maintained a disciplinary policy regarding employees' failure to lock out equipment prior to working on it. There is no mystery as to the reason for this. As Slaughter explained, "[i]t's a federal law that equipment has to be locked out properly to ensure the safety of the employee when they're doing any maintenance or cleaning the equipment to ensure that it's not energized and will not start while they're doing this maintenance." (Tr. 243-244.)

The Employer's original lock out disciplinary policy reflects its grounding in Federal health and safety regulation, citing 29 CFR § 1910.147.95 Documentary evidence produced by the Employer shows that the original disciplinary sanctions for lock out violations tracked the overall progressive disciplinary system. A first offense would result in a written warning, a second offense would yield a 5-day suspension, and a third offense would lead to termination. (GC Exh. 79, p. 7.)

20 The documentary record also reflects that the Employer applied this policy to violations on a regular basis. Thus, on March 1, 2007, Sybil Hamman was issued a written warning for cleaning a moving roller without locking it out. In that warning, it was explained that "[c]leaning machine parts while they are in motion is a direct violation against Interbake Foods LLC Lock Out Tag Out Policy." (GC Exh. 77.) On May 21, 2007, Gronczewski issued a 25 written warning to Will Crawford for cleaning mixing blades without first locking out the equipment. The warning noted that the employee risked termination for such violations of the lock out policy. (GC Exh. 76.) Exactly one month later, Gronczewski issued another written warning to Sharon Davis for cleaning a roller without using the lock out tag out procedure. She was also warned of possible termination for future violations. (GC Exh. 75.) On September 20, 30 2007, Tara Quinn was issued a written warning citing her "poor performance" due to violation of the lock out procedure when she opened the back of a SIG machine without first locking it out. (GC Exh. 73.)

It is evident from this documented history that the policy of issuing warnings for first offenses was ineffective in securing universal compliance with the lock out policy. Gronczewski testified that management decided to rewrite the lock out procedures by creating a zero tolerance disciplinary policy that mandated termination for even a first offense. The Company took

⁹⁵ That regulation establishes a workplace safety standard for "lock out/tag out." It is intended to apply to "the control of energy during servicing and/or maintenance of machines and equipment." 29 CFR § 1910.147(a)(2)(i). Essentially, employers are required to establish and maintain a lock out and tag out program and train employees in the proper use of these procedures.

vigorous steps to announce and explain this change. Among the impressive documents presented in support of this contention were a series of training slides. For example, the topic was introduced in a slide that advised, "Interbake Foods now has a Zero Tolerance Policy for not following lock out tag out practices. You will be terminated from Interbake Foods if you choose not to lock out the equipment. This is for your protection!" (GC Exh. 56, p. 3.) [Punctuation in the original.] Subsequent slides explained that this new "harsh policy" was necessitated by the history of lock out violations, including two that resulted in serious injuries. Employees were exhorted to assure that, "[t]hese accidents must stop now!!!!" (GC Exh. 56, p. 4.) [Punctuation in the original.]

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The record reflects that this new policy was first applied in November 2007. At that time, Ben Wilson was observed to be cleaning a dough hopper without first locking it out. The decision to actually fire Wilson was made at the very top, by Kantner. Slaughter issued the termination notice for the offense of "[v]iolating lock out tag out policy." (R. Exh. 76.) There is no contention by the General Counsel that Wilson was a union supporter or that his discharge was improperly motivated.

Gronczewski testified that since the establishment of the zero tolerance policy, all lock out offenses have resulted in termination. There have been three additional terminations: Malcomb in February 2008, Clyde Stovall in March 2008, and Heather Anderson in August 2008. Of the four persons discharged under the zero tolerance policy, the General Counsel alleges discriminatory motivation as to two, Malcomb and Stovall. The fact remains that there is nothing to rebut the Employer's assertion that the new policy has been consistently applied to every lock out violator without exception. Lastly, it should be noted that Gronczewski opined that the new policy has served its intended purpose of enhancing workplace safety because lock out violations have now "virtually stopped." (Tr. 3206.)

I find that the Employer has proven that it applied the zero tolerance policy to Malcomb in a consistent and nondiscriminatory manner. Two additional matters must be discussed. The General Counsel contends that there is an exception to the zero tolerance lock out policy and that Malcomb's behavior should have fallen within that exception. There are two difficulties with this argument. It is true that several employees testified to something they called a "diagnostic exception" to the policy. (Tr. 2642.) This would permit a maintenance department employee to allow a malfunctioning piece of equipment to continue running in order to observe it and assess the nature of the malfunction. Indeed, Malcomb went so far as to claim that lock out was really intended for production line employees, not maintenance technicians.⁹⁷

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⁹⁶ Interestingly, one of these slides also discusses lock out policy regarding the cleaning of "dirty rollers." (GC Exh. 54, p. 13.) It explains that the equipment must be locked out during such cleaning.

⁹⁷ This is certainly incorrect. In fact, the OSHA regulation that formed the impetus for the Company's policy is specifically directed toward the protection of workers engaged in the "servicing and maintenance of machines and equipment." 29 CFR § 1910.147(a)(1)(i).

I do not doubt the logic behind the concept that maintenance employees are permitted to run the machine in order to watch it in operation and determine the nature of any malfunction. Thus, there has never been a claim that Malcomb did something wrong when he focused his attention on the roller and observed it in operation. As he testified, in doing this he noticed that the roller had a large amount of impacted debris that could explain its malfunction.

The problem that led to Malcomb's discharge was that, after he diagnosed the malfunction, he went on to provide treatment of the problem without first locking out the equipment. It was his act of employing a tool to remove the impacted debris from an operating roller that constituted a clear violation of the Employer's zero tolerance policy, a policy that was designed to protect its employees from harm and also to comply with Federal labor policy.

Finally, I have considered the implications of the fact that the Employer's policy is clearly a very strict one, requiring that employees lose their means of livelihood for even a first offense. Indeed, I have already noted that the Employer, itself, characterized the policy as "harsh" in its training materials. (GC Exh. 56, p. 4.) It justifies such harshness by citing the degree of danger involved in lock out violations. In any event, the ultimate point is one expressed long ago by the Fifth Circuit:

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In passing the Act, Congress never intended to authorize the Board to question the reasonableness of any managerial decision nor to substitute its opinion for that of an employer in the management of a company or business, whether the decision of the employer is reasonable or unreasonable, too harsh or too lenient. The Board has no authority to sit in judgment on managerial decisions.

NLRB v. Florida Steel Corp., 586 F.2d 436, 444-445 (5th Cir. 1978).98

I find insufficient evidence to prove that this Employer knew that Malcomb was a union advocate or supporter. Beyond this, I find highly persuasive evidence to establish that it discharged Malcomb because he chose to use his wrench to remove debris from a moving roller at risk to his own safety and in direct violation of its zero tolerance lock out policy.

35 f. Clyde Stovall

The General Counsel next alleges that Clyde Stovall was suspended on March 10, 2008, and terminated on March 12, 2008, in retaliation for his union support and activities. (GC Exh. 1(j), par. 19.) The Employer asserts that it suspended and terminated Stovall through neutral

⁹⁸ The Board quoted this language from the holding in *Florida Steel* with approval in *Neptco, Inc.*, 346 NLRB 18, 20, fn. 16 (2005).

application of its zero tolerance policy for lock out violations. In applying the *Wright Line* analysis, many of the features of this controversy are quite similar to those just discussed regarding Malcomb's dismissal for a lock out violation.

As with Malcomb, the General Counsel's evidence regarding Stovall's involvement in protected union activities is scant, consisting primarily of the undisputed fact that he did sign an authorization card dated January 11, 2008. (GC Exh. 95.) Stovall had been hired in February 2007 as a machine operator. Soon after he began working at the facility, he became aware of the first union organizing campaign. He forthrightly acknowledged that, during that campaign, he "was against the union loudly." (Tr. 935.) Indeed, his views were known to management to the extent that he was asked to serve as an alternate election observer for the Employer. He agreed to do so.

When the second organizing effort commenced, Stovall had a change of opinion. He testified that he signed the authorization card and also asked for additional cards. In his account, he understandably attempted to portray an active pattern of prounion involvement. Close examination of his testimony, however, reveals that this involvement was rather illusory. While he reported that he obtained cards for the purpose of soliciting others, he testified that he only passed out one such card and he could not recall the name of the worker to whom he gave this card. He attempted to explain this circumstance by indicating that he kept the cards in his lunchbox in the breakroom and he reported that someone had removed the cards while the box had been left unattended. He asserted that he complained loudly about this theft and specifically told Supervisor Halterman about it. This claim was significantly impeached by his two prior affidavits. Neither of those sworn statements made any mention of his reporting of this incident to Halterman, despite the obvious importance of establishing the extent of his protected activities and management's awareness of them. At the first Wright Line step, I conclude that Stovall signed a union card. I do not find sufficient credible evidence to support a conclusion that he solicited support for the Union from his coworkers. The General Counsel's burden is met only to the extent that Stovall expressed his support for the Union by signing an authorization card.

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At the next step of the assessment, I have already noted that I cannot credit Stovall's belated claim that he intended to actively solicit cards for the Union. His uncorroborated testimony as to this point was insufficient for this purpose, particularly in light of his strong interest arising from his status as an alleged discriminatee. Indeed, even while contending that he engaged in this sort of activity, Stovall conceded that he was "not very open because I was unsure of my position and having [authorization cards] on the plant property." (Tr. 936.) However, Stovall contended that he engaged in one public act of union support, placing a prounion bumper sticker on his car. No supporting evidence was offered and this contention is at direct variance with his testimony that his union support was "not very open." (Tr. 936.) As with Malcomb, management officials presented uniform accounts indicating that they were unaware of Stovall's support for the Union, particularly in light of his well-known opposition to the Union during the first campaign just months previously.

In analyzing whether the General Counsel has met his burden of demonstrating that the Employer had knowledge of Stovall's union support, I have again applied the tests established in the leading case, *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enf. 97 F.3d 1448 (4th Cir. 1996). I have not found credible direct evidence of any knowledge by management that Stovall had altered his openly expressed antiunion opinion. Turning to the circumstantial evidence, the fact that this employer knew of union activity within the plant is not probative, given that it also was well aware that Stovall had opposed such activity in the past. While the timing of Stovall's discipline was during the runup to the second election, this factor is not convincing. It is just as true that the timing was in the midst of the Company's zero tolerance campaign relating to lock out violations. Ultimately, the timing was not chosen by the Employer. It was dictated by the date on which Stovall was observed to be violating the lock out requirement.

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As to evidence of animus, the General Counsel does not argue that proof was offered of animus against Stovall specifically. (See GC Br. at p. 194.) While I have found animus in this case, it is based solely on acts and statements by managers that transgressed the legal limits of campaign tactics. In no instance have I found that managers possessed the degree of animus that would manifest itself in discriminatory retaliation against prounion employees. Nothing in this Employer's past conduct raises an inference that it would have known about Stovall's union support and possessed the will to fire him as a result.

As to the remaining *Montgomery Ward* factors, I reject the General Counsel's contention that Stovall's discharge was inconsistent with other personnel actions by the Company. As with Malcomb, I credit the Company's assertion that it moved to a zero tolerance policy for sincere and legitimate safety reasons and that it applied that policy uniformly to all employees. Indeed, the two employees who were fired under the policy prior to Stovall were an employee, Wilson, who was not alleged to have been a union supporter, and Malcomb, who was lawfully discharged after a coworker reported him for a lock out violation. Furthermore, I have already noted that the Employer presented convincing evidence as to the reasonableness of its lock out policy in light of the safety issues involved. I conclude that there is insufficient evidence, either direct or circumstantial, to support a finding that the General Counsel has carried the burden of demonstrating management's knowledge of any union support or protected activity by Stovall.

For jurisprudential reasons that I discussed in connection with my consideration of Malcomb's discharge, I will carry the analysis through the remaining steps. I did not find any credible evidence of animus directed specifically toward Stovall. This is hardly surprising given that I did not find evidence establishing that management even knew of Stovall's change of opinion regarding the Union. As with other alleged instances of discrimination, I do conclude that management engaged in sufficient general acts of interference with protected rights to make a finding that the General Counsel has met the burden as to animus.

The burden now shifts to the Employer to demonstrate that it suspended and discharged Stovall for genuine and legitimate reasons and that it would have taken the same action

regardless of any union support or activity on Stovall's part. Assessment of this claim requires detailed examination of the events leading to Stovall's termination.

Stovall was hired as a machine operator. At the time of these events, he was assigned to the second shift with primary duties on line 4. However, as was routine practice, the Employer also gave him cleaning responsibilities on line zero. The Employer presented extensive documentary evidence to show that Stovall had received training on the lock out/tag out requirements for machine operators. To quote one particularly clear example, Stovall placed his signature immediately below the following statement:

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I am responsible for locking and tagging out the energy sources to prevent unexpected start up of machinery that I am cleaning or maintaining. The lock out tag out policy at Interbake Foods must be adhered to at all times.

No exceptions!!

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(R. Exh. 14, p. 3.) [Emphasis in the original.] Stovall also acknowledged attending lock out training as recently as February 29, 2008, less than 2 weeks prior to the events involved in this case.

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The record is also clear in establishing that Stovall understood the level of management's heightened concern regarding lock out violations. He indicated that he attended a meeting in January 2008 at which Safety Manager Gronczewski told the employees that there would not be any warnings for lock out violations in the future. He also confirmed counsel for the Employer's observation that Gronczewski stated that from now on, "[i]t's immediate termination." (Tr. 977.) He acknowledged that, in counsel's phrase, the Employer was now "plac[ing] extreme importance on lock out/tag out procedures." (Tr. 966.)

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It is necessary to focus attention on the lock out procedures related to the chores involved in cleaning line zero. As was the Company's practice, Stovall was trained in these procedures by coworkers, primarily by machine operator Joe Hughes. There was much testimony by Stovall, Hughes, and other employees who cleaned line zero regarding the content of that training. As may be expected, Stovall attempted to convey the impression that he had not been properly instructed, while Hughes disputed this contention.

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In order to address the legal issues in this case, it is necessary to explain a bit of the geography of this production line. The portion involved here begins with a dough trough hopper. This is immediately followed by a dough feed conveyor belt. That belt, in turn, leads to a laminator hopper. It is abundantly clear that, before starting to clean any one of these pieces of machinery, an employee must personally ensure that the power source to that machinery is disabled. This must be done by placing a lock and identifying tag on the proper point of control for the power to that piece of equipment. Finally, the employee is required to test the efficacy of his or her lock out procedure by attempting to operate the equipment. If the equipment fails to function, verification of a successful lock out has been achieved. These fundamental principles of the lock out policy were established by overwhelming evidence, both testimony and

contemporaneous documentation. Furthermore, the authenticity of these principles is underscored by logic and common sense.

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On the night in question, March 10, Hughes told Stovall to start cleaning equipment on line zero. Stovall proceeded to the dough trough hopper and placed his lock on the dough trough hopper lock out position. He tested the power and, having assured that it was off, he cleaned the hopper. He continued his cleaning with the adjacent dough feed conveyor belt. In order to clean this piece of equipment, he climbed up onto the belt itself.⁹⁹ Unfortunately, he did not remove his lock and tag from the dough trough hopper and transfer it to the lock out point for the dough feed conveyor. Having failed to transfer the lock, Stovall also failed to test the conveyor to determine whether it was inoperable.

At this point, I note that Stovall attempted to contend that he was unaware of the proper lock out point for the task he was performing. There are two difficulties with this self-serving contention. In the first place, given the inherent danger involved and the repeated emphasis placed on this issue by management, it was incumbent on Stovall to seek this information before climbing onto the belt and placing himself at risk. Second, it is clear that the Employer provided a prominent label on the lock out point in order to avoid this precise problem. Interestingly, both parties provided photographs of this key label. The General Counsel's black-and-white photo shows a label, but its content is indistinguishable. (GC Exh. 78, p. 3.) The Respondent's color photo shows the identical spot with the label easily visible. In large letters, it says, "DOUGH FEED CONVEYOR." This legend is located immediately underneath a prominent red switch for the power source located on the electrical panel. (R. Exh. 91, p. 6.)

The evidence is clear in establishing that the Employer requires employees to locate the proper lock out point for equipment that is about to be cleaned. In this instance, that point was clearly labeled. Furthermore, any risk of error in locating the correct lock out point is eliminated by the Employer's additional requirement that the equipment be tested for operability before the cleaning commences. Stovall failed to locate the proper lock out point, failed to lock out the

⁹⁹ There was considerable testimony indicating that this was an unsafe thing to do. The proper procedure would have been to obtain a ladder and stand on it to perform the cleaning operation. Stovall attempted to justify his failure to follow this course by explaining that he had "weak wrists" which prevented him from cleaning the equipment while standing on the ladder. (Tr. 919.) None of this matters because Stovall was not discharged for climbing onto the conveyor belt. As counsel for the Employer stated, "[i]t is a lock out/tag out violation, not which angle [Stovall was] lying on the lamination belt." (Tr. 1856.) Regardless of how Stovall chose to position himself, he would have been required to lock out the belt.

¹⁰⁰ There were indications that the power to the dough feed conveyor could also be locked out at the main electrical panel. Given that there was no claim that Stovall used this alternate method, this is irrelevant.

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dough feed conveyor, and failed to test the conveyor before climbing onto it. 101 As a result, he violated the lock out policy.

While Stovall was lying on the belt engaged in his cleaning activity, Safety Manager Gronczewski entered the area. He did so as part of his regular practice of observing safety conditions throughout the plant. Employee Kim Carter was on duty at this moment. She confirmed that Gronczewski's presence was not out of the ordinary. As she put it, "I didn't think anything of it. Sometimes he comes around and just walks around the building." (Tr. 1847.) Stovall, himself, agreed with counsel for the Employer's observation that it was not uncommon for Gronczewski to be "out on the floor ensuring that equipment was locked out and tagged out as employees were working on the equipment." (Tr. 974.)

Gronczewski testified that he observed Stovall lying on the belt while scraping with a plastic knife. He reported, "I saw Clyde up there, and I did not see that equipment locked out." (Tr. 445.) He walked around the equipment to examine both the main electrical panel and "the individual lock out point, which is right on the equipment labeled dough feed conveyor, and there was no lock out on there." (Tr. 454.) Gronczewski instructed Stovall to get down immediately, telling him that "we have a problem . . . you don't have the equipment locked out." (Tr. 457.) Stovall objected that he had his lock out on the dough trough hopper. This was confirmed when he proceeded to remove his lock and tag from that location. Gronczewski testified that Stovall then said, "I'm sorry. I made a mistake. I'm sorry." (Tr. 461.) At that point, Gronczewski suspended Stovall pending further action.

Stovall's own account of these events is not greatly different. He testified that, while he was lying on the belt cleaning, he heard Gronczewski say, "Clyde, where's your lock out/tag out? I said my lock out/tag out is on the dough trough hopper." (Tr. 928.) Gronczewski then told him to "get down, you're in big trouble." (Tr. 929.) He added that Stovall "could have been killed." (Tr. 929.) Stovall says he replied that he had not been told where to lock out, but "[i]f I was supposed to lock out there, I wasn't trained to do it, but if it's my responsibility, I'm guilty

¹⁰¹ In his testimony, Stovall conceded that he failed to test the conveyor belt before climbing onto it. (See Tr. 979-980.)

 $^{^{102}}$ The panel Gronczewski described is the one depicted in the photos at GC Exh. 78, p. 3 and R. Exh. 91, p. 6.

¹⁰³ Gronczewski explained that this was unavailing since, "what he had locked out would not lock out that dough dump conveyor belt he was lying on top of." (Tr. 3221.)

of it, but I didn't know I was supposed to lock it out there." (Tr. 929.) At this point, he was taken to Slaughter and suspended.

There is one other disputed piece of testimony that should be addressed. Gronczewski testified that, in the course of defending his actions, Stovall asserted that he had asked Hughes to lock out the equipment for him. When questioned about this during his testimony, Stovall first denied it. However, he then retracted this, stating, "No, I do not deny that I said anything like that." (Tr. 984.) In his own testimony, Hughes reported that he heard the exchange between Gronczewski and Stovall and that Stovall did assert that "I [Hughes] was supposed to lock it out." (Tr. 3319.) Afterward, Gronczewski asked Hughes if he had been asked to lock out the conveyor for Stovall. He denied any such request by Stovall. As Gronczewski put it, Hughes said he had "no idea what I was talking about." (Tr. 3227.) It should be noted, in any event, that asking a coworker to lock out equipment for oneself is also a policy violation. In particular, it is a failure to properly tag out. 105

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I readily conclude that the Employer has demonstrated that Stovall's conduct violated the zero tolerance lock out/tag out policy in several key respects. He failed to properly locate the lock out point for the conveyor belt that he was lying on while cleaning equipment. He neglected to move his lock from the first item he cleaned, leaving himself vulnerable to injury from any unexpected operation of the next piece of equipment. Perhaps most importantly, by his own admission, he failed to test the conveyor before climbing onto it. Had he performed this essential component of the Company's lock out procedure, he would have been alerted to the dangerous situation and been able to take remedial steps. All of this behavior represents clear and serious misconduct under the terms of the Employer's lock out/tag out policy.

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Of course, this does not end the inquiry. It is not sufficient for the Employer to simply prove that the discharged employee violated a work rule. It must also prove that it would have

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¹⁰⁴ As I have already explained, Stovall's attempt to justify his conduct is not persuasive since he should have asked for assistance if he did not know the proper lock out point. The Employer called coworker Brittney Garcia, who testified that Hughes trained Stovall and herself shortly before these events. He told them to "use the lock out point on the electrical cabinet for this area." (Tr. 3136.) Hughes also testified consistently with Garcia as to the content of his training instructions. More importantly, Stovall failed to test the belt before climbing onto it. Such a test would have shown him that he did not have the belt locked out.

¹⁰⁵ The reason this is a serious matter is that the purpose of the tag out process is to alert other employees and supervisors as to the exact identity of the employee who is servicing the equipment. If for some reason, it became necessary to remove the lock from the device, the person doing so must have the necessary information to locate and warn the specific employee who would be endangered by unexpected operation of the item of equipment. If Hughes had locked out the belt for Stovall, another person seeking to energize the equipment would have looked for Hughes to warn him. Nobody would have known that it was necessary to warn Stovall.

sanctioned this violation in the identical manner regardless of any union support or activity. In other words, it must demonstrate that the decision to discharge Stovall was made for genuine, legitimate reasons and represented a sincere and consistent response to Stovall's workplace offense. I find that the evidence clearly supports such a conclusion.

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In the first place, I have carefully considered the role of Safety Manager Gronczewski. There is no doubt that he initiated the process that led directly to Stovall's discharge. Beyond this, he was a major actor in many of the events involved in this case. The testimony and documents demonstrate that he was a dedicated and sincere proponent of workplace safety at Interbake. His actions involving Stovall were entirely consistent with his job responsibilities and his conscientious enforcement of those duties throughout his tenure. Beyond the clear evidence that he was genuinely committed to workplace safety, there was no credible evidence of any sort to indicate that he was involved in any antiunion planning or activities. ¹⁰⁶ I conclude that Gronczewski's actions were motivated by legitimate safety concerns, not animus against Stovall or against the Union. Indeed, even Stovall reported that, at the moment he ordered Stovall to get off the conveyor belt, Gronczewski appeared to be concerned for his safety.

As to the context of management's actions against Stovall, I have already noted that the documentary evidence provides impressive support for the Employer's contention that, as the plant passed its startup phase and entered ongoing full operations at the end of 2007, management amended the lock out policy in response to a series of accidents and injuries that had been experienced. The first application of the new zero tolerance policy was the discharge of Ben Wilson for cleaning a dough hopper without first locking it out. There is no contention that Wilson's discharge was affected in any way by a union issue. The second application of the zero tolerance policy was the termination of Milo Malcomb. I have already discussed my conclusions that the Employer was unaware of Malcomb's limited union activities and that his discharge was based on the genuine application of the new policy to his failure to lock out a roller before he used a tool to remove excess debris from it. The decision to discharge Stovall for a lock out violation that involved multiple breaches of the lock out/tag out procedure is entirely consistent with both the zero tolerance policy and the Company's history of prior applications of that policy.

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¹⁰⁶ The only conceivable testimony suggesting that Gronczewski sought to interfere with union activity was provided by Malcomb. He claimed that Gronczewski told employees that "if you all was out there talking about the union on the floor, you're working unsafe, you ain't doing your job." (Tr. 1358.) This was totally undercut during cross-examination when Malcomb conceded that Gronczewski actually told employees that talking about anything while on the production line was unsafe. Thus, counsel asserted, "So what [Gronczewski] was referencing was, if you're basically having any conversation out on the line, in his opinion, you weren't working safely?" Malcomb replied, "[e]xactly, in his opinion, yes." (Tr. 1458.) All of this serves to underscore Gronczewski's zealous commitment to workplace safety, not any animus against the Union.

The General Counsel points to other disciplinary records to suggest that Stovall's treatment was unduly severe. There is no doubt that termination for a first offense is harsh. Indeed, the Employer acknowledged this reality in its communications with employees about the new policy. Given the potential harm that may arise from a lock out violation, a harsh disciplinary policy appears entirely reasonable. Of course, it is not the place of the Board or its judges to pass on such matters. The essential point which the General Counsel has not perceived is that the bulk of the Employer's disciplinary policies and the record of how they were applied are actually quite lenient. For all offenses other than lock out violations, the Employer uses a progressive system and exercises discretion in imposing punishments by taking various factors into account. All of this is well documented in the record.

It follows that analysis of the Employer's disciplinary system does show inconsistency between disciplinary consequences for lock out violations and for all other safety infractions. Thus, the General Counsel is correct in observing that other employees committed unsafe acts and received lesser sanctions. The key distinction is that unsafe acts committed while the machines were supposed to be running did not constitute lock out violations subject to the zero tolerance disciplinary policy. For example, when Tina McFadden suffered a serious injury as her finger came into contact with a moving chain, she had behaved in an unsafe fashion. However, the chain was supposed to be in motion. There was no failure to lock out the equipment.

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After examining all of the disciplinary records relating to safety issues, I conclude that counsel for the Employer is correct in arguing that the General Counsel has "confused" the issue. (R. Br. at p. 63.) As counsel explains:

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All lock out/tag out violations, by their nature, are unsafe acts, but not all unsafe acts are lock out/tag out violations. The alleged instances of disparate treatment involve unsafe acts as they were acts of carelessness . . . but they were not lock out/tag out violations.

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(R. Br. at p. 63.) When proverbial apples are compared to apples, the Employer has imposed consistent discipline under its zero tolerance policy.

I find that the General Counsel has failed to carry his burden of establishing that the Employer knew of Stovall's protected union sympathies and activities. In contrast, I conclude that the Employer met its burden of proving that Stovall was discharged through the impartial and genuine application of its zero tolerance policy to his clearly-established violation of lock out/tag out safety procedures.

g. John Robinson

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The focus now shifts dramatically away from consideration of whether the Employer had knowledge of particular employees' union activities and whether it applied its safety rules in an impartial and neutral manner. The General Counsel's final allegation of unlawful discrimination during the 2008 organizing campaign involves the discharge of John Robinson on March 14,

2008. Robinson was a very prominent union activist during the earlier organizing effort in 2006 and 2007. It is contended that management's animus against his role in the organizing campaigns led to its decision to terminate his employment. In contrast, the Employer asserts that Robinson's employment terminated due to his voluntary decision to refuse to accept a work assignment on the third shift.

As to Robinson, the first two steps of the *Wright Line* analysis are easily resolved. He began working at Interbake in November 2005. In early 2006, he became actively involved in the organizing campaign. His involvement was quite open, including participation in handbilling outside the plant. Indeed, his involvement was so open and persistent that it caused him to run afoul of the Employer's solicitation rule on several occasions. Robinson also served as one of the Union's election observers during the first campaign.

With regard to the second organizing effort, Robinson explained that his situation had changed somewhat. In December 2007, he had been issued a final written warning for insubordination in a matter unrelated to any organizing activity. As a consequence, he decided to take "more of a back seat" regarding the renewed campaign. (Tr. 746.) This is not to suggest, however, that he had abandoned his support for the Union. He signed an authorization card on January 11, 2008. (GC Exh. 87.)

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There is no question that the Company's managers knew of Robinson's support for the Union. Indeed, Schleuss and Slaughter, the two managers who attended the meeting that led to the cessation of Robinson's employment, both testified that they knew he was a supporter of the Union.

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Interestingly, in applying *Wright Line*, I have been given pause at this point in the analysis by the inherent requirement that I find that Robinson suffered an adverse employment action. There is no dispute that, at the time he ceased working for Interbake, the Employer was offering him ongoing, full-time employment. Furthermore, as will be discussed in more detail later, the offer was for a position that he was medically fit to perform and that he had stated was entirely satisfactory to him. It is difficult to discern the presence of an adverse action here. On the other hand, the parties have not raised this issue or addressed it in their briefs. I presume that the Employer does not raise the issue because it treated Robinson's departure as a termination

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¹⁰⁷ My concern regarding this question is not unique. Robinson applied for unemployment compensation on the basis that he had been involuntarily terminated from his employment. The State administrative agency denied his claim. In appropriate circumstances, the Board considers such administrative action as probative evidence. As the judge stated in *Painting Co.*, 330 NLRB 1000, 1012 (2000), enf. 298 F.3d 492 (6th Cir. 2002), "it is the Board's policy to take into account what state agencies have to say about why an employer terminated an employee's employment." See also *Crispus Attucks Children's Center*, 299 NLRB 815, 836 (1990), and *Whitesville Mill Service Co.*, 307 NLRB 937, 945, fn. 6 (1992). It is appropriate to do the same here.

from an internal administrative viewpoint. On the state of this record, I will assume that Robinson was subjected to an adverse action by the Employer.

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At the next step in the analysis, I have already repeatedly noted that the Employer's violations of Section 8(a)(1) constitute evidence of animus. Beyond this, there is considerable additional evidence directly related to Robinson. In April 2006, Supervisor Markham told him that he bore a "black mark" against himself due to his union activities. (Tr. 655.) This and similar expressions of anger at Robinson's prominent role in the 2006 campaign are evidence of animus directed toward him. While this may have been attenuated by the passage of time and also by Robinson's decision to take a lesser role in the 2008 effort, I conclude that it would still have been present to some degree.

The General Counsel cites to one particular document as direct evidence of unlawful animus against Robinson at the precise time that the events at issue were taking place. This consists of an email string among managers which notes that Robinson had reached maximum medical improvement after having suffered a work injury, and that it would be necessary to determine his future position with the Company. In response, Operations Manager Cahill posed a series of questions regarding Robinson's past job history and the role of the workers' compensation insurance carrier in resolving the issue. He concluded his email with the following observations, "In good faith we have gone out [of] our way to accommodate his restrictions. Maybe its [sic] time we move on." (GC Exh. 142, p. 1.)

In reviewing the voluminous documentary record in this case as to the issues of unlawful discrimination, this email is the only example of a statement by a manager that has given me pause. I comprehend how a reasonable person could view it as an expression of the sort of unlawful animus that would undergird a discriminatory discharge of an employee. In that regard, it stands alone in this case.

Having carefully analyzed this document, I conclude that Cahill's remarks are not evidence of unlawful animus against Robinson's protected activities. To be clear, I certainly agree that Cahill's comments demonstrate animus against Robinson personally. However, close reading reveals that the topic that was arousing Cahill's ire was Robinson's workers' compensation status. It was Cahill's irritation at the need to "accommodate his restrictions," that prompted his desire to consider Robinson's termination. (GC Exh. 142, p. 1.) While potentially otherwise unlawful and clearly inappropriate, this comment was not directed at Robinson's involvement with the Union. See *ITT Federal Services Corp.*, 335 NLRB 998, 1001 (2001)

¹⁰⁸ It is also possible that the parties viewed the issue as one possibly involving the Board's constructive discharge doctrine. See *North Carolina Prisoner Legal Services*, 351 NLRB 464, 470 (2007) (where employer changed working conditions in retaliation for protected activity, and that change could reasonably have been foreseen to cause the employee to quit, constructive discharge doctrine applies). As will be shown, the factors required to establish a constructive discharge are not present here.

(manager's hostility toward alleged discriminatee was not evidence of unlawful animus where it had not been "motivated by *antiunion* hostility"). [Italics in the original.]

I must stress that any remaining doubt as to whether Cahill's expression of interest in terminating Robinson's employment may be evidence of unlawful discriminatory intent is dispelled by the fact that the officials who were directly responsible for resolving Robinson's status did not pursue Cahill's suggestion. To the contrary, they offered Robinson ongoing employment in a position that met his medical restrictions and that he had previously indicated was satisfactory to him. Thus, at worst, Cahill's comments were the expression of personal antipathy against Robinson on the part of an individual who did not play any role in the events that led to Robinson's departure from employment.

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Regardless of the import of Cahill's email, the evidence demonstrates that the General Counsel has met his initial burden of showing that Robinson engaged in protected activities; that managers were well aware of his role; and that, to the extent he was subjected to any adverse employment action, unlawful animus against union supporters was present. The burden now shifts to the Employer to demonstrate that Robinson's employment would have ended at this time for reasons that would have applied regardless of his union support and activities.

In order to assess the Employer's defense, it is necessary to review Robinson's relevant medical history and the events involved in the key meeting at which Robinson's future was to be determined. Robinson testified that, in May 2007, he was working as a mixer. In the course of pushing a spindle over the mixing machine, he "felt a sharp pain" in his lower back. (Tr. 698.) He reported his injury to his supervisor and was referred for treatment at Warren Memorial
Hospital. The diagnosis was a lumbar sprain and Robinson was instructed to "take it easy" for a week. (Tr. 699.) The Company complied with this restriction by assigning a temporary employee to perform the lifting component of his job. At the end of the week, Robinson reported that he was improving and he was taken off light-duty status.

Unfortunately, several weeks later, on June 9, 2007, Robinson was lifting a bag of flour and felt a sharp pain, "a lot worse than the first time around." (Tr. 700.) He returned to the hospital and an MRI revealed two bulging discs. His physician placed him on light-duty status and the Company accommodated by assigning him tasks such as sorting bolts, inspecting, and writing standard operating procedures. In addition, in July he began receiving training in how to operate a SIG machine.

After several months of light duty, Robinson was referred to an orthopedist, Dr. Zoller, for evaluation. Dr. Zoller confirmed the diagnosis of bulging discs and continued his light-duty status. By October 2007, Robinson reported that he was feeling, "pretty good." (Tr. 715.) As a result, Dr. Zoller decided to try him out on medium duty, including lifting of up to 50 pounds. With this improved functional capacity, Robinson was returned to regular duty. This experiment proved to be unsuccessful and, on October 19, 2007, Dr. Zoller returned Robinson to light-duty status for a three-month period.

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Significantly, Robinson reported that during this three-month stretch of light-duty work, he was assigned to operate a SIG machine. This assignment proved most satisfactory as it made his back feel, "much better." (Tr. 717.)

At this point, in December 2007, an event occurred that proved to be controversial in the sense that the parties presented differing accounts. Robinson was working on line 1 under the direction of Supervisor Madigan. He testified that Madigan told him that he was "no longer qualified" to work on the SIG machine. (Tr. 720.) She reassigned him to the warehouse to dump waste product. He complained about this reassignment to Plant Manager Kantner but was told that it was up to Madigan. Robinson testified that he stayed on the dumping job for about a month and was then assigned as a cracker inspector for the remainder of his time at Interbake.

Madigan testified that at the time she transferred Robinson, her line was overstaffed, having 14 workers instead of the mandated staff of 12. She was ordered to reassign two people. She chose Robinson and Buddy Becker, employees who had been inspecting at the vibrators. Due to the large volume of scrap product, these men were given the duty of handling waste materials at the warehouse. Madigan specifically denied that she ever told Robinson that he was no longer qualified to operate a SIG machine.

Robinson's transfer did not sit well with him. According to Madigan's contemporaneous reports, Robinson took it upon himself to leave his job post and work on the SIG instead. Madigan discovered this on two separate occasions. In addition, she reported that Robinson was not completing the required paperwork for his waste product assignment. As a result, she issued him a final written warning for insubordination and "defiant" behavior. (R. Exh. 10.) There is no contention that this disciplinary action was unlawful in any manner.

The next controversy involving Robinson occurred in February 2008. At that time, the Employer announced an opening on a SIG machine on the daylight shift. This was posted in the breakroom. Robinson applied for the position. He was disgruntled when the position was awarded to Tara Quinn, an employee whom Robinson thought was very antiunion. He registered his complaint with Slaughter who told him that he "was not qualified to run the machine." (Tr. 730.)

Slaughter confirmed that a SIG job was announced in February and that Robinson and Quinn applied. Quinn was selected because, under the Employer's written Internal Hourly Job Move Policy, she was qualified while Robinson was not. That policy specifies that "[t]o be qualified, an employee must currently be assigned to the same position for a minimum of six

¹⁰⁹ Indeed, Robinson testified to the general improvement in his back condition, noting that "even to this day, if I don't do a lot of twisting, I'm good." (Tr. 718.) He noted that he was able to "run around" with his children and hunt. (Tr. 719.)

months." (R. Exh. 75, p. 1.) Only if no "qualified" applicants are available, will another employee be selected. (R. Exh. 75, p. 1.)

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I would observe that it is perfectly obvious why the Employer would have selected Quinn over Robinson. Robinson was on temporary medical restrictions. It was unknown whether Dr. Zoller would eventually authorize him to perform the duties required in any particular job on a permanent basis. In addition, he had recently been issued a final written warning for insubordination. Beyond this, he did not meet the Employer's definition of a qualified applicant. In contrast, Quinn was not only qualified, but even Robinson agreed that she was a very good SIG operator and had helped to train him on the machine. There is nothing in the least bit suspicious here.

The Employer posted another opening for a SIG machine operator on March 13, 2008. This time, the opening was on the third shift. On the day before, Robinson attended a key meeting with Dr. Zoller. Also present at this time was the case manager for the workers' compensation carrier, Janet Falcon-Hilliard. Dr. Zoller advised Robinson that he had reached maximum medical improvement. He continued to suffer from a "mild" disability as described in the doctor's written findings. (GC Exh. 10.) In particular, Dr. Zoller assessed significant limitations in bending and lifting. Lifting was restricted to a maximum of 20 pounds. Robinson testified that, at the end of this meeting, he told Falcon-Hilliard that he strongly disliked the inspector job but liked the SIG operator position.

The Employer was furnished with a copy of Robinson's final physical capacity evaluation form showing the extent of his restrictions and limitations. It is both logical and undisputed that, once an employee has reached maximum medical improvement, a meeting is held at which the employee's functional limitations are assessed and, if feasible, a permanent position is selected consistent with those physical restrictions. Slaughter provided uncontroverted testimony that, if no suitable position could be found, the employee would be terminated. This assessment process was followed in the case of Robinson.

The meeting with Robinson was held on March 14, 2008. Slaughter and Schleuss were the Employer's representatives at the meeting. All three participants provided testimony about the contents of their discussion.

Robinson reported that Slaughter began the meeting by asking him if he believed that there were jobs he was capable of performing. He responded that there were "lots" of such positions. (Tr. 734.) He suggested a job as forklift operator. Slaughter opposed this, observing that "[i]t would be too hard for me physically because of my light duty status." (Tr. 734.)

¹¹⁰ In his direct testimony, Robinson asserted that he was qualified under the terms of the policy. However, on cross-examination, he conceded that this was not the case. Compare Tr. 761 with Tr. 828-829.

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Robinson noted that he next suggested an assignment as a saw wasser, but Slaughter "dismissed that." (Tr. 735.) Finally, he testified that he proposed a position as a SIG machine operator. Slaughter responded by informing Robinson that there was an opening for such an operator on the third shift. He testified that, on hearing this, he asked Slaughter, "I just applied for the daylight SIG, was told I was not qualified for it, and why would I want to go to third shift?" (Tr. 735.)

Robinson reported that, immediately upon hearing his response to the offer of the third-shift SIG position, Slaughter told him, "[W]ell, then you're terminated. You've just turned down the only job Interbake offered you." (Tr. 736.) Robinson objected, requesting time to investigate his rights in the matter. This request was denied and the meeting came to an end.

In her account of this meeting, Slaughter reported that the three participants began by agreeing that Robinson's restrictions prevented him from returning to his former position as an inspector. Slaughter testified that the three participants determined that the only position suitable for Robinson's restrictions was the SIG operator job. She then checked the available vacancies and determined that there were only three openings of any type in the plant. Her testimony in this regard is corroborated by job descriptions for each of these three positions. (GC Exhs. 32, 33, and 34.) The first opening was for an inspection job of the type they had already decided was beyond Robinson's capacities. (GC Exh. 32.) The second was for a production support forklift operator. While Robinson expressed some belief that he could perform this job, it clearly exceeded his residual functional capacity as determined by Dr. Zoller. The job description provides that the applicant must have "[a]bility to lift 50 pounds." (GC Exh. 33.) It will be recalled that Dr. Zoller's written report restricted Robinson to lifting of no more than 20 pounds. (GC Exh. 10.) This left one remaining opening which was for a SIG operator on the third shift. The position description for this job does not list any lifting requirement. (GC Exh. 34.)

Having determined that one position existed that matched Robinson's residual capacities, Slaughter testified that she offered it to him. He agreed that he could do the SIG job, but stated that "he wasn't giving up the first shift." (Tr. 3059.) As described in her contemporaneous written account of the meeting, she then stated, "[T]his was the only SIG position I had, so since

¹¹¹ The record reflects that there were no openings for a saw wasser. This would explain Slaughter's failure to engage in any discussion of Robinson's ability to perform the work.

¹¹² The Employer introduced an email dated January 16, 2008, in which Gronczewski had informed Slaughter that Robinson told him that he was unable to perform the inspection job and was requesting a reassignment. (R. Exh. 73.) This certainly supports Slaughter's contention that Robinson acknowledged that he could not perform the duties of an inspector.

¹¹³ This was certainly a critical problem. Robinson's bulging discs appear to have originally been caused by his lifting of a flour sack.

he declined it, I would have to terminate his employment." (GC Exh. 36.) Slaughter then prepared a termination form which notes the basis for the discharge as Robinson's refusal to take the only available position that fit his capacities. (GC Exh. 37.)

Schleuss also provided an account of this meeting. He stated that the participants were all in agreement as to the nature and extent of Robinson's permanent restrictions. They discussed a variety of jobs in order to assess whether Robinson was capable of meeting their physical requirements. These included, "mixer, machine operator, baker, inspector, SIG operator." (Tr. 2967.) Schleuss testified that the three agreed that the only one that fit Robinson's residual capacities was the SIG operator. Schleuss specifically reported that Robinson did not suggest any alternative to this position.

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Once the meeting participants had focused on the SIG job, Schleuss testified that Slaughter examined her files to see what was available and told Robinson, "John, we have a third shift SIG operator position available." (Tr. 2969.) Robinson replied, "I can do the job, but I will not do the shift. I refuse the shift." (Tr. 2970.) Slaughter then warned him that he would be terminated if he refused. He maintained his refusal and Schleuss escorted him from the building.¹¹⁴

To the extent that there are any material differences among these accounts of the meeting, I credit the testimony of Slaughter and Schleuss. It was detailed, consistent, and completely supported by an array of impressive documentary evidence that demonstrates that Robinson was offered the only position that met his capacities and chose to decline it. Robinson, himself, conceded that he did not know of any other job that was available. Although the General Counsel engaged in extensive discovery through the subpoena process, no evidence has been offered to show that any other position existed within Robinson's physical abilities. I readily conclude that the Employer treated Robinson in a nondiscriminatory manner that was entirely consistent with its procedures. There is no credible evidence to support any conclusion that his treatment was affected in any degree by the Employer's awareness of his union support or by the Employer's animus against the Union.

I recognize that the General Counsel has a far different viewpoint regarding the motivations of this Employer towards Robinson. It is well expressed in the following contentions from the brief:

Schleuss' contemporaneous written account is consistent with his testimony, noting that Robinson stated that "I don't want to get fired" but, "I'm not giving up 1st shift." (R. Exh. 71, p. 2.)

Robinson's accounts were not consistent. Thus, he told the State unemployment compensation agency that he did not refuse the SIG position, but was instead fired for union activity. He contended that "I would have gladly gone to 3rd shift [rather than] to being fired." (R. Exh. 12.) This is contrary to virtually all of the evidence presented in this trial.

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Respondent's propensity to play both sides of the fence to circumvent the law is revealed by its inconsistent and illogical approaches in its dealings with John Robinson concerning his employment and termination. Respondent fulfilled its preconceived objective of using Robinson's medical restrictions as a cover to terminate his employment.

(GC Br. at p. 207.)

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I find this view of the Employer's behavior here to be rather bizarre and reflective of what I have characterized as counsel for the General Counsel's overall inability to visualize this Employer in terms other than melodramatic or cartoonish. Let us examine the General Counsel's theory. In the first place, the Employer foregoes an easy opportunity to dismiss Robinson at the beginning of the renewed organizing campaign. It will be recalled that Robinson engaged in persistent insubordinate and defiant misconduct by refusing to perform his duties as assigned by Madigan. Rather than jump at the opportunity to rid itself of a difficult employee, the Employer exercised forbearance and confined its discipline to the issuance of a final written warning. I note that the General Counsel has never contended that this final warning represented an adverse action motivated by unlawful animus.

Having passed on an ideal opportunity to fire Robinson, the Employer is now alleged to have engaged in an elaborate and unrealistic conspiracy to get him to quit. Apparently, the plan was to wait until he reached maximum medical improvement and then somehow assure that there would be no job available for him that he would accept. In the real world, this plot would be totally impractical. In the first place, the Employer was hardly in a position to dictate the timing of Robinson's maximum medical improvement. This decision was in the hands of Dr. Zoller and rested primarily on Robinson's course of recovery. Thus, the Employer had no way of knowing when Robinson would be available for permanent assignment or whether any job openings might exist at that undetermined moment.

Beyond this, such a plot would require the Employer to be able to predict the sort of job that Robinson would refuse to accept. Given that Robinson had a sick child, it is difficult to imagine that he would be likely to refuse to retain employment that provided health insurance for his family. In addition, it would certainly have been an inept conspirator who would have selected the SIG position to offer Robinson in hopes he would decline it. Robinson had always expressed his desire to perform this job, most recently to the workers' compensation case

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¹¹⁶ Robinson, himself, made this point in his argument to the unemployment compensation agency. He argued that he would not have voluntarily quit. As he explained, "I have a sick child at home that needs long term care[,] why would I refuse work to get fired and loose [sic] my medical benefits[?]" (R. Exh. 12.)

manager at the moment he had been found to have reached maximum medical improvement. Finally, there was no indication that Robinson would adamantly refuse to work the third shift. As he reported, he had worked this shift for long periods of prior employment. If the Employer's conduct represented a conspiracy, it was noteworthy for its ineptitude.

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Frankly, I am equally puzzled by counsel for the General Counsel's position as to a remedy for Robinson. What would they have the Company do? If they are asserting that the Employer has a duty under the Act to treat Robinson more favorably than it would treat others who were similarly situated, I know of no legal support for such a viewpoint. The Act protects against unfavorable discrimination against union supporters, it does not in any manner mandate discrimination in favor of these supporters.¹¹⁷

In my view, counsel for the General Counsel are attempting to fit a round peg into a square hole. They seek to view Robinson's situation as a routine remedial matter requiring that the Board return him to some status quo ante. While there is no substantive discussion of this point in their lengthy brief, their attitude is expressed in the terms of their proposed remedial order. That proposed order suggests that I direct the Employer to "offer John Robinson . . . full reinstatement to [his] former job . . . " (GC Proposed Order, p. 5.) Such a remedy would be futile. Robinson cannot perform his prior work or any work that is substantially equivalent to it. His medical condition precludes any return to the status quo ante. I decline to engage in an exercise of wishful thinking.

In sum, Robinson regrettably suffered impairment to his health that reduced his ability to perform many types of production work. His Employer accommodated his needs during his lengthy period of recovery by providing temporary light-duty assignments. Once he had reached maximum medical improvement, he was offered full-time, ongoing employment in a position that he was capable of performing. He refused the offer due to his dislike of the schedule. As he explained, "[i]t's not totally important, but it's nice to work day shift. I've worked third shift before in the past for years [for other employers]." (Tr. 836.) It is patently clear that Robinson's employment at Interbake came to an end by his voluntary decision. In its treatment of Robinson after he had reached maximum medical improvement, the Employer did not violate the Act in

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¹¹⁷ I am not unsympathetic to Robinson's undoubtedly genuine complaint that night-shift work would interfere with his parental obligations. However, this is not a legal argument, nor does it take into account the fact that all employees at Interbake were well aware that the plant operated around the clock. Furthermore, this consideration does not factor in the needs and obligations of any coworker who may have been involuntarily transferred to the night shift in order to satisfy Robinson's demands.

any manner.118

The General Counsel does not allege any additional discriminatory disciplinary actions against union supporters prior to the second representation election. That election was held on April 16, 2008. Afterward, the parties conducted the trial in this case, involving both unfair labor practice allegations and representation issues arising from the second election.

5. Alleged violations in 2009 (Interbake II)

During the course of this trial, the General Counsel called Melissa Jones as a witness on behalf of the prosecution. She provided her testimony on December 10, 2008. On February 20, 2009, the Employer discharged Jones. The General Counsel alleges that this adverse action against Jones was a violation of three separate provisions of Section 8 of the Act. It is contended that it was unlawful because it was a direct response to Jones' protected concerted activity in violation of Section 8(a)(1). It is also alleged to have represented unlawful discrimination against Jones due to her involvement with the Union in violation of Section 8(a)(3). Finally, it is asserted to constitute unlawful retaliation against Jones arising from her participation in this case as a witness for the General Counsel and the Charging Party in violation of Section 8(a)(4). (GC Exh. 148-H, pars. 6, 9, 10, 11, 12, 13, and 14.) The Employer responds by contending that Jones was lawfully discharged due to her violation of multiple work rules and policies related to her actions in secretly recording conversations with supervisors, managers, and coworkers.

In her direct testimony on December 10, 2008, Jones provided information regarding several issues in the trial. In particular, she provided testimony that formed the basis for the unfair labor practice charge alleging that Supervisor Anderson had coerced employees by stating that the Employer would eliminate its 401(k) plan in the event the employees became covered by a union pension. Jones testified that Anderson made this statement to her in a private conversation in an office in the production area of the facility.

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In seeking relief for Robinson, counsel for the General Counsel appear to endorse his theory which they describe as the "principle" that "he was the third most senior employee in the plant and should not have to go on to third shift." (GC Br. p. 105.) There is no legal foundation for the attempt to force this Employer to alter its lawful and established treatment of persons returning to full duty after an injury by imposing a new procedure. As the Board has very recently noted, assignment of work on the basis of seniority is a principle utilized "particularly in unionized workplaces." *Rochester Regional Joint Board Local 471 (Sodexo, Inc.)*, 359 NLRB No.166, slip op. at 5 (2013). Interbake was not a union shop and the General Counsel has no authority to attempt to treat it as such by mandating some sort of seniority rule. As the Fifth Circuit has explained, absent proof of unlawful discrimination, an employer has "full authority to . . . determine where, when, why and how [employees] will work, what their duties are, and how long they will be employed." *NLRB v. Florida Steel Corp.*, 586 F.2d 436, 444 (5th Cir. 1978).

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On cross-examination, Jones admitted that she had made a secret recording of this conversation with Anderson. She reported that she had smuggled a small recording device into the facility and onto the production floor. This device has been variously described as being the size of a small cellular telephone or a standard deck of playing cards. She testified that she used the device to record three conversations consisting of the encounter with Anderson, a discussion with maintenance employee Rickard, and a line team meeting. She also reported that she had provided the recording device to the Union for the purpose of preparing a transcript of the conversation with Anderson. When asked if she knew that the possession of recording devices inside the production facility was a violation of the Employer's work rules, she conceded that it was. However, she defended her conduct by asserting that she did not become aware of the rule against such devices until after she had recorded the conversations.

HR Manager Slaughter testified that, in February 2009, General Manager Kantner asked her to conduct an investigation of Jones' conduct, telling her that Jones had made "some recordings within the plant." (Tr. 3583.) It is clear that Slaughter made a special effort to conduct a thorough and well-documented investigation. Unlike the General Counsel, I do not find this to have been unusual. At the time Jones' testimony revealed her secret recording activities, there was discussion on the record about the likelihood that the Employer would

¹¹⁹ Surprisingly, there was no reference to this recording on direct exam. Apparently, counsel for the Employer learned of the existence of the recording by reference to Jones' affidavit which was provided to him under the Jencks Act.

¹²⁰ Jones was very clear on the witness stand in asserting that she made only these three recordings. (See Tr. 2195, 2198.) There is strong evidence that this testimony was untruthful. In particular, the contents of her recording device contained a lengthy recording of a speech by Cahill regarding collective bargaining. Jones claims she forgot about this recording. I find this to be totally unconvincing given her repeated claims that she was making recordings, in part, to assist the Union in documenting misconduct by the Employer related to the organizing effort.

¹²¹ Slaughter's testimony as to the date of Kantner's directive to her contained some minor inconsistencies. The General Counsel finds these to be suspicious. I do not agree. It is certainly obvious that Jones' trial testimony provided the basis for the Employer to conduct an investigation. Several weeks after she testified, her recorder was furnished to counsel for the Employer. On December 30, 2008, counsel sent it to an expert for analysis. (R. Exh. 45.) After the analysis was completed and a report was prepared, Kantner directed Slaughter to initiate the personnel process that culminated in the discharge of Jones. It is entirely logical that this occurred sometime in February 2009.

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investigate her conduct and, quite possibly, impose a sanction. There was also discussion about the likelihood that such a sanction would result in more unfair labor practice allegations. Anticipating heightened scrutiny of the manner in which her investigation would be conducted, Slaughter took precautions, including the solicitation of assistance from the Company's legal counsel and from Angela Otto, a human resources specialist with the corporate offices in Richmond. 123

Slaughter testified that her investigation consisted of a review of the Employer's rules and policies that may have been relevant to Jones' conduct, an examination of the Employer's past practices with regard to recording devices, reading the expert's analysis of the contents of Jones' recorder, preparing a series of investigatory questions with the assistance of counsel, and, ultimately, conducting two investigatory interviews with Jones. The two interviews were held on February 17, 2009, in the presence of Otto.

Both Slaughter and Otto provided detailed testimony about the contents of the interviews with Jones. In addition, they created substantial contemporaneous documentation of those events. Slaughter reported that, at the first interview, Jones repeated her trial testimony that she had made a total of three recordings. She also stated that she had never deleted any recordings from the device. Jones asserted that she made the recordings in response to the firing of Phillip Underwood. She believed that Underwood had been fired as a result of conflicting instructions issued to him by Henline and Anderson. In order to avoid the same dilemma for herself, she resolved to obtain recordings of instructions from her supervisors so as to protect herself from Underwood's fate. 124

Given this claim, Jones was also asked why she had used the device to record her conversation with Anderson, a discussion that had nothing to do with the possibility of conflicting work instructions. Jones replied that "she was afraid of getting cornered alone with

¹²² This discussion during the course of the trial raises a matter that troubles me. Jones contended that she learned that her recordings violated the Company's handbook as of the summer of 2008. The General Counsel and the Union called her to testify months later. It is clear from the discussion at trial that they had anticipated the likelihood that her testimony would put her at risk for punishment. The testimony that would put her in jeopardy was confined to an unfair labor practice allegation of an unlawful statement by a supervisor, one count among very many such allegations. The decision to persist in procuring Jones' testimony with its predictable outcome puts me in mind of the old African proverb which holds that "when elephants fight, it is the grass that gets trampled."

¹²³ The Employer has stipulated that, during her participation in the Jones investigation, Otto was acting as an authorized agent of the Company. (See Tr. 3789.)

 $^{^{124}}$ In providing this explanation, Jones never raised any issue of Underwood's union activities as a contributing factor in his termination.

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Janet [Anderson]."¹²⁵ (GC Exh. 153, p. 1.) Slaughter also asked Jones whether she knew that it was against company policy to bring a recorder onto the production floor. She denied knowing this at the time she made her recordings. She contended that she did learn of the policy in the summer of 2008, "when she was looking through the handbook and saw the policy." (GC Exh. 153, p. 2.)

Otto confirmed Slaughter's account, including Jones' contention that she made only three recordings and that the purpose of her actions was to create a record of supervisory instructions to guard against any claim that she had violated those instructions. She also admitted giving the recorder to Union Official Price for a few days. Lastly, she asserted that she had not been aware of the Employer's rule against possession of recording devices at the time she made the recordings. She indicated that she learned of this prohibition in the summer of 2008 when she was looking at the handbook.

The second interview with Jones was held later that day. In the interim, Slaughter and Otto had reviewed the expert's spreadsheet that listed all of the recordings made by Jones. It shows that there were nine recordings of significant length. The remaining recordings were merely acts of turning the machine on and off. (R. Exh. 114.) Slaughter testified that she disclosed this document to Jones at the second interview. In particular, they confronted Jones with the fact that she had recorded a 90-minute meeting conducted by Cahill, as well as, other conversations. Jones offered feeble explanations, raising the possibility that she may have "accidentally" turned on the machine and may have fiddled with the machine while in her automobile. (Tr. 3663.) She contended that she did not remember recording the Cahill meeting. At the conclusion of the interview, Jones apologized for "forgetting about the Cahill meeting." (Tr. 3668.) Otto corroborated Slaughter's description of the second interview with Jones, noting that when confronted with the expert's spreadsheet, Jones claimed that she had forgotten about recording Cahill's meeting.

Stunningly, Jones was not called to testify regarding the events involved in her discharge from Interbake's employ. No explanation of this peculiar omission has been provided by the General Counsel, either on the record at trial or in the posttrial brief. Jones' absence is

¹²⁵ Of course, this is patently absurd. It is undisputed that Jones traveled across the production floor to confront Anderson in the contractor's office. It was Jones who initiated the discussion and controlled the content and course of that conversation. Had she been afraid, she would hardly have been likely to have sought out Anderson for this purpose. Indeed, the recording reveals that she was the aggressor in the conversation and that Anderson responded in a rather submissive fashion. This claim provides dramatic evidence of Jones' unreliability as an informant in this case.

¹²⁶ Slaughter testified that Jones never claimed that she made recordings to assist the Union. She reported that "the only reason" offered by Jones was to "protect herself" from possible discipline arising out of conflicting supervisors' instructions. (Tr. 3745, 3744.)

particularly unusual given that she had testified in the first portion of the trial just months earlier ¹²⁷

Counsel for the Employer urges me to make an adverse inference from Jones' failure to testify. The Board recognizes such an analytical principle which it has characterized as a "missing witness" rule. *Martin Luther King, Sr., Nursing Center,* 231 NLRB 15, 15, fn. 1 (1977). Citing a standard legal encyclopedia, the Board defined the rule as being correctly invoked, "where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may drawn an inference that such evidence would have been unfavorable to him." Infra., at fn. 1. The Board elaborated in *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006), observing that:

Normally, it is within an administrative law judge's discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably be assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when that witness is the party's agent and thus within its authority or control. It is usually fair to assume that the party failed to call such a witness because it believed that the witness would have testified adversely to the party. [Footnote omitted.]

See also *Forsyth Electric Co.*, 332 NLRB 801, 818 (2000), and *Daikichi Sushi*, 335 NLRB 622 (2001), enf. 56 Fed. Appx. 516 (D.C. Cir. 2003). Typically, such an inference has been applied to the failure of a respondent to produce testimony from its supervisors. Nevertheless, it is clear that the rule is properly invoked against any party, including the General Counsel. See *Stabilus, Inc.*, 355 NLRB 836, 840, fn. 19 (2010) ("failure to call a potentially corroborative witness may be considered in determining whether the General Counsel has established a violation by a preponderance of the evidence"), and the cases cited therein.

I do not hesitate to apply the missing witness rule in assessing whether the General Counsel has established that Jones was unlawfully discharged. She clearly possessed highly relevant information regarding the circumstances of her discharge, including the contents of her two investigatory interviews, her knowledge of the Employer's rules and policies, and the

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¹²⁷ Jones testified on December 10, 2008, and the proceedings regarding her discharge commenced on July 28, 2009.

¹²⁸ I suspect the reason that there are fewer reported cases involving the application of the missing witness rule against the General Counsel is because the General Counsel has the prosecutorial discretion to decline to proceed in circumstances where a key witness' prospective testimony is likely to be adverse to the prosecution's case.

reasons why she chose to record conversations. It was obviously in her interest, including her pecuniary interest, to testify in this case. No explanation for her failure to testify was provided and, given her recent appearance as a witness in the case, no explanation is otherwise apparent. This is a classic example of the probative worth of the Board's missing witness rule. In evaluating any and all contested issues of fact regarding Jones' discharge from employment, I will infer that her own testimony, if given truthfully, would have been favorable to the Employer's position.

Taking this factor into account, I find that Slaughter and Otto's testimony and written descriptions of the interviews with Jones are credible and accurate. Beyond the adverse inference, I base this conclusion on the careful and deliberate manner in which they proceeded with their investigation and its documentation and on the consistency of their accounts, both internally and with each others' versions. To the extent that Jones has offered any contrary accounts or explanations of her behavior, I discredit them as being uncorroborated even by her own testimony at the trial of her case.¹²⁹

At the conclusion of the investigatory interviews, both Slaughter and Otto determined that Jones should be discharged for misconduct. Slaughter made the actual decision and meticulously documented her reasoning at the time. Her persuasive rationale bears quotation at some length:

I conclude that [Melissa] Jones knowingly made the recordings aware she was violating company policy and lied about the recordings. The act of recording proprietary information without permission is a serious offense. In my mind, we have five separate policy violations:

1. Bringing the recorder into the facility in violation of company policy (which was in the handbook she received and reviewed

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To cite one such example, Jones claimed that she was unaware of the rule against bringing recorders into the plant until months after she made the recordings. This was undercut by the Employer's proof that Jones had been issued a handbook at the time of her hiring and Slaughter's credible testimony that she had personally gone over the relevant Electronic Devices Policy in this handbook with Jones at that time. Jones' signed receipt for the handbook is dated September 11, 2006. (GC Exh. 154.) While the General Counsel produced testimony from union supporter Whittington to the effect that she was present when the handbook was explained to Jones and that the Electronic Devices Policy was not discussed, this claim is contradicted by her additional testimony that she was not hired until September 22, 2006. (Tr. 3863.) Even prominent union advocate, Paul Goode, testified that "[i]t's common knowledge not to have electronic devices" on the production floor. (Tr. 3913.) [Counsel for the Employer's words.] Moreover, Jones' claim of ignorance of the policy is at odds with the fact that she smuggled the recorder into the plant and told nobody that she was using it. The covert nature of her behavior is strong evidence that she was aware that her conduct was in violation of the Company's work rules.

- even though she says she didn't learn about the policy until after she made the recordings);
- 2. Secretly recording confidential team line meetings in which customer and production issues were discussed;
- 3. Recording other manager meetings and conversations with employees that they were not aware of. This also violates the company policy under the Employee Work Conduct section of the handbook which addresses being honest in your dealings with fellow employees, treating every employee with dignity and respect and supporting and abiding by company policies, guidelines, procedures;
- 4. Lying about how many recordings she made and failing to fully cooperate with our investigation;
- 5. Giving the recordings to individuals outside the Company which means confidential production information could have been given to competitors, customers, and used to hurt the Company.

(GC Exh. 153, p. 5.)

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Slaughter's written account goes on to note that she examined the Company's practice regarding electronic devices and determined that a canvas of the production area showed only "a couple of large radios (boom boxes) . . . not for recording purposes." (GC Exh. 153, p. 5.) Finally, she noted that she found only one prior instance of a known violation of the policy which resulted in the issuance of a written warning. This incident involved an employee using a cell phone on the production floor to telephone his wife. Based on these considerations, Slaughter determined that discharge was appropriate.

The General Counsel argues that the termination decision was unlawful under virtually every standard of assessment provided in the Act and the Board's precedents. In particular, the argument involves three separate means of analysis. First, it is asserted that Jones' discharge was entirely based on her protected concerted activity and was inherently unlawful under the terms of Section 8(a)(1) of the Act. Second, it is contended that Jones' termination constituted unlawful discrimination against her due to her union support and activities in violation of Section 8(a)(3). Finally, it is claimed that Jones was discharged in retaliation for her testimony against

¹³⁰ See GC Exh. 157, which is a list of electronic devices found in the plant. It shows that none of them had the capability to make recordings.

the Employer in the first phase of this case in violation of Section 8(a)(4). Each of these claims lacks merit.

As to the first contention, that Jones was fired as a direct response to her concerted protected activities, the Board's methodology was set forth in *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001), revd. in part 78 Fed. Appx. 469 (6th Cir. 2003), as follows:

The discharge of an employee will violate Section 8(a)(1) of the Act if the employee was engaged in concerted activity (i.e. activity engaged in with or on authority of other employees and not solely on her own behalf), the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity.

15 I will now perform this required analysis.

The parties strongly dispute the issue of whether Jones' conduct in secretly recording conversations constituted concerted activity within the meaning of the statute. The opposing lawyers have tied themselves into knots in order to characterize Jones' conduct in a manner that fits their tactical positions at any given moment as to this question. Thus, one member of the General Counsel's legal team characterized Jones' recording activities as consisting of "gathering evidence to support potential unfair labor practices," while another member of the prosecution team asserted that Jones was fired for providing "proprietary information about line team meetings that are in these recordings to people outside." (Tr. 3543, 3883.)

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The lawyers for the Company have been no less inconsistent. In their brief, they argue that "Jones repeatedly stated that she acted alone and on her own behalf to protect herself from possible conflicting instructions from her supervisors." (R. Br. II, p. 31.) However, in an earlier pleading, they took the opposite tack, explaining that "Jones' obvious goal was to try to record and preserve allegedly incriminating statements by Interbake's management . . . for use by either herself or the [Union]. . . . Obviously, these multiple recordings had nothing to do with Jones 'protecting herself.'" (R. Exh. 115, p. 3.)

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I sympathize with the lawyers' predicament. In my view, it stems from the fact that Jones actually had two motivations. When she recorded her discussion with Anderson about the collective bargaining process and also when she recorded Cahill's meeting at which he addressed employees regarding collective-bargaining, she was acting in a manner that she believed would assist the Union in its effort to prosecute the Employer for unfair labor practices. When she recorded the two line team meetings, she was acting to protect herself in the event she became embroiled in a dispute with supervisors over conflicting work instructions.

It is now necessary to place Jones' two motives into the appropriate legal framework. In its leading case on the topic of concerted activity, the Board held that "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the

authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985). The fact that Jones contends that she acted alone and without discussing her plan with anyone else is not dispositive. As the Supreme Court has noted, "an individual may be engaged in concerted activity when he acts alone." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984). As the Sixth Circuit has explained, "[t]he relevant inquiry in determining whether an employee's action was concerted, therefore, is whether the employee acted with the purpose of furthering group goals." *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 539 (2000). [Citation and internal punctuation omitted.]

Applying these principles, it is clear to me that, when Jones recorded Anderson and Cahill discussing collective bargaining, she was acting with the aim of furthering the goals of the Union and her coworkers who supported that organization. By hoping to capture and preserve evidence of misconduct by the Employer, she believed that she would be strengthening the Union and aiding the organizing effort. This was concerted activity within the meaning of the Board's precedents.

On the other hand, when Jones recorded line team meetings, she was acting as an individual for her own selfish reasons. Jones explained that she recorded these meetings because she knew that the line team leader would issue work instructions at them. Her intention was to preserve these oral instructions in the event that a front-line supervisor would impose contrary instructions at a time when the line team leader was unavailable. The entire purpose was to protect herself from possible discipline in the event she was faced with conflicting instructions from two different supervisors. ¹³¹ I recognize that the General Counsel asserts that part of her rationale for this fear was a belief that such a conflict could be used as a pretext to fire her for her union activities. There is insufficient evidence to support this view. Jones never raised any such concern in her investigatory interviews. She did not testify in *Interbake II*, and could not be cross-examined about such an assertion at a time when such examination would have been directly material. Furthermore, such an assertion is internally inconsistent. If management were determined to use any pretext to fire her for union activity, illicitly recorded past instructions would hardly be likely to save her from this fate. I find that Jones' acts of recording line team meetings were not concerted activity as they were designed solely to assist her in dealing with her own private concerns.

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Based on this analysis, I conclude that Jones engaged in concerted activity when she recorded some of the conversations that led to her discharge. As a result, the analysis must

¹³¹ In reality, this was a rather meaningless fear. As I discussed in detail regarding the discharge of Underwood, the proper solution to the problem anticipated by Jones was for the affected employee to follow the instructions of the immediate supervisor who was present and refer the larger issue to upper management later on.

proceed to the next step. Without doubt, the Employer was aware of Jones' concerted activities at the time it decided to fire her. As Slaughter put it, "she intended to entrap Janet [Anderson] in an attempt to get her to say something incriminating on the tape." (GC Exh. 153, p. 4.) The element of knowledge is clearly present.

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The critical inquiry now becomes the issue of whether Jones' activity was protected under the Act. The precedents are not entirely clear. The General Counsel correctly notes that the Board does not find that secretly recording a supervisor is, in itself, unprotected conduct. For instance, it found an employee to have engaged in protected activity when he secretly recorded a meeting with a supervisor during which he anticipated he might be subjected to discipline for a workplace infraction. However, the Board's holding was not a sweeping one. In particular, the Board took care to note that "where the Respondent has no rule barring such recording," there was no showing of employee misconduct sufficiently egregious to remove it from the protection of the Act. *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (2011), enf. 677 F.3d 1241 (D.C. Cir. 2012). In fact, this represented the second time the Board had addressed the issue and carefully limited its holding. In *Opryland Hotel*, 323 NLRB 723, 723, fn. 3 (1997), the question was presented in the context of an employer's contention that an employee forfeited the remedy of reinstatement because he had secretly recorded conversations in the workplace. The Board rejected this contention in the following manner:

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The Respondent has no rule, prohibition, or practice against employees using or possessing tape recorders at work. . . . And, in the absence of such rule, practice, or prohibition, we do not find—as does our colleague—that such possession or use constitutes misconduct that would defeat reinstatement. In our view, [the employee's] conduct was not *malum in se*.

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My interpretation of what the Board is saying here is that it will leave the question of any sanction for possessing a recorder and secretly recording conversations to the policy judgments of individual employers when they craft their work policies and rules. In other words, such behavior, while clearly unpleasant and sneaky, is not a per se offense of the egregious character that would lose the Act's protection. However, the fact the conduct is not *malum in se* does not foreclose an individual employer from making that conduct *malum prohibitum*. The necessary

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¹³² I certainly reject counsel for the General Counsel's vastly overbroad characterization of the scope of protected activity under the Act. She asserted that Jones "had the right to, under the Act, she was protected under Section 7 of the Act, to gather evidence in support of unfair labor practices. She was protected in gathering evidence to support the union, to assist the union" (Tr. 3550.) Such an interpretation would cover any and all concerted activity. It would read the requirement that activity be of a protected character right out of the statute. As counsel for the Employer observed, such an interpretation would authorize employees to steal files or hack computers with impunity. It is evident that such a result was not intended by Congress. See *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

implication of the Board's careful wording is that, if this conduct violates a valid, nondiscriminatory work rule, that would render the behavior outside the Act's protections.¹³³

While I have found no Board precedent regarding the loss of protected status due to violation of a rule prohibiting recording devices, there are other precedents that clearly point in that direction. For example, in *Benson v. Potter*, 210 Fed. Appx. 530 (7th Cir. 2006), cert. denied 552 U.S. 1283 (2008), the Seventh Circuit upheld the discharge of an employee for secretly recording a conversation with a supervisor in violation of a rule in the employer's handbook. Among the interesting aspects of this precedent was the court's notation that the plaintiff filed the lawsuit "[a]fter unsuccessfully bringing a charge . . . with the National Labor Relations Board." 210 Fed. Appx. at 531.

The Board has held that employees who violate a work rule in the course of taking steps designed to protect themselves from adverse actions have lost protection under the Act. In *Gates Rubber Co.*, 186 NLRB 837 (1970), an employee was accused of manufacturing a defective part. In order to aid his defense against this claim, he smuggled the part out of the plant in violation of a rule that prohibited removal of items from the plant without prior permission. The Board upheld his discharge for violation of the rule despite the "small monetary value" of the part that had been removed. 186 NLRB at 837.

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Similarly, the Board has determined that disclosure of confidential information in the course of concerted activity may be unprotected. In *Altoona Hospital*, 270 NLRB 1179, 1180 (1984), it held that "[a]n employee's violation of an employer's rule against the disclosure of confidential information may also be the subject of lawful discipline even when the disclosure is made for reasons arguably protected by the Act." See also *Frontier Telephone of Rochester*, 344 NLRB 1270, 1277-1279 (2005), enf. 181 Fed. Appx. 85 (2d Cir. 2006), where, in violation of a work rule, an employee forwarded proprietary and confidential information from the employer's database to his home computer. The Board affirmed the judge's denial of reinstatement for the employee based on this misconduct.

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In my view, the Board would not prohibit this Employer from applying its disciplinary process to a violation of its prohibition against possession of recorders in the production area of its plant, particularly when the device had been used to record confidential information at a team meeting which was then disseminated outside the plant.

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¹³³ There is a very clear analogy presented by another set of facts arising in this litigation. When Robinson solicited coworkers to join the Union, he engaged in the most classic form of concerted activity. Had he done so on breaktime, the solicitations would clearly have been protected under the Act. By choosing to engage in the concerted solicitation activity during worktime in violation of the Employer's valid work rules, Robinson lost the Act's protection.

¹³⁴ Apparently, the charge involved her contention that her union had failed to discharge its obligation to adequately prosecute her grievance against the employer arising from her termination.

Of course, this discussion presupposes that this Employer had a valid, nondiscriminatory work rule and that it applied that rule to Jones in a nondiscriminatory manner. There is no dispute that the Employer's handbook does contain a prohibition against possession of recording devices. In pertinent part, it provides:

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In order to keep the lines of communication open and to ensure the health and safety of all employees, personal cellular telephones, personal radios, televisions, personal tape recorders and players and similar electronic devices are not permitted anywhere in the facility.

(GC Exhs. 3(a), p. 48 and (b), p. 47.) There is no contention that this policy is invalid or discriminatory on its face. In addition, I find that the policy itself expresses valid, nondiscriminatory, rationales for its existence. Of course, the most obvious is the concern for safety and health which could be adversely affected by distractions created by use of these devices. Beyond this, the policy expresses a rationale precisely tailored to the facts of this case. It is apparent to me that the use of concealed recording devices would interfere with the open lines of communication that are deemed important by the policy's terms. It is entirely reasonable for this Employer to have determined that the possibility of concealed recording of conversations would impede free and open discussion among the members of its work force.

In addition to determining that the Electronic Devices Policy is valid on its face, I have concluded that the Employer has proven that it has been applied in a nondiscriminatory manner. Slaughter testified that the policy has largely been self-executing. Prior to Jones' conduct, there had only been one violation of the policy that had come to the attention of management. On March 7, 2008, Supervisor Henline issued a written warning to William Harris for making a telephone call to his wife from a personal cell phone while "on the production floor." (R. Exh. 113.) I conclude that this instance of discipline is consistent with the actions taken against Jones. It demonstrates that the Employer did view its policy against possession of electronic devices on the production floor as a proper matter for imposition of workplace discipline. While the discipline issued to Harris was much lighter than that imposed on Jones, I find that the difference in severity is readily explained by the difference in the misconduct. Jones repeatedly violated the rule against recording devices and did so in a manner that directly implicated all of the Employer's policy concerns. In addition, as explained in Slaughter's written rationale for the discharge decision, Jones' actions implicated a variety of other disciplinary issues that affected the severity of the Employer's response.

The General Counsel argues that the Employer's enforcement of the policy against electronic devices was inconsistent, leading to a conclusion that it served as a pretext to fire Jones. To some extent, this argument is rather ironic when asserted on behalf of the Union. Slaughter did testify that the Employer had relaxed the rule to the extent that electronic devices were tacitly permitted in areas such as the locker room or lunchroom. It strikes me as poor policy for the General Counsel to argue that an employer's desire to relax its prohibition in order to make the workplace more pleasant should preclude that employer from enforcing its rule in

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the precise circumstance the rule was designed to address. Allowing a radio in the lunchroom hardly sends a message to employees that they may ignore the rule prohibiting recorders in the production area, let alone that they may feel free to use a concealed recorder to capture the statements of their coworkers and supervisors. I reject the argument that the Employer eviscerated its valid rule by applying it in a common sense and carefully limited manner consistent with its underlying rationale.

In sum, I conclude that certain of Jones' activities that formed the basis for her discharge were not concerted within the meaning of the Act. When she recorded two line team meetings, she did so for her own purposes, without the authorization or involvement of any coworkers. The Employer was privileged to discharge Jones for her conduct that was not concerted. I also conclude that Jones engaged in concerted activities when she recorded two conversations regarding the parameters of the collective-bargaining process. The discussion with Anderson and the speech by Cahill were recorded in order to advance the perceived interests of the Union and its supporters among the work force. ¹³⁵

Where an employee engages in concerted activity, her employer is not privileged to sanction that activity if it is protected by the Act. I find that Jones' concerted activities were not protected by the Act because they were undertaken in direct violation of the Employer's preexisting, valid, and nondiscriminatory rules. In this connection, I note that Slaughter relied on several rules and policies in addition to the Electronic Devices Policy. She concluded that Jones violated the Employee Work Conduct Policy of the handbook by secretly recording her coworkers, behavior which was implicitly dishonest and showed a lack of respect toward fellow employees. I agree with this characterization of Jones' conduct. Perhaps the clearest illustration of what Slaughter had in mind is revealed in the recording of the conversation with Anderson. It certainly violated Anderson's expectation of honest and respectful behavior as outlined in the Employee Work Conduct Policy when Jones secretly recorded her prounion statements and gave that recording to Price to use for his own purposes.

¹³⁵ I have already explained that counsel for the General Counsel invariably attribute sinister motives to the Employer and assume the absolute innocence of the Charging Party in this controversy. Typically, they rush to accept Jones' uncorroborated claim that she acted entirely on her own by smuggling the recorder into the plant. This is true despite their recognition that she had originally testified that "the Union had instructed her to look out for instances of possible illegal conduct by Respondent, and providing the recorder to Price was one example of her providing information to the Union that she felt was inappropriate conduct by the company." (GC Br. II, p. 5.) One of the General Counsel's witnesses testified that a union official had explained to her that the Union used the filing of unfair labor practice charges as "leverage" against the Employer. (Tr. 1684.) As I have already noted, it is not necessary to make any finding as to whether the Union solicited Jones to make the secret recordings. I make these observations only because I consider the failure to take a balanced view of the institutional parties' motives and behaviors to have led counsel for the General Counsel astray in the manner in which they have prosecuted portions of this case.

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In addition, Slaughter concluded that Jones' failure to be truthful during her investigatory interviews was a ground for her termination. I agree that the evidence demonstrates that Jones was not candid in her statements during the investigation. She denied making any erasures on the recorder, an assertion directly contradicted by the expert's findings on examining the device. I also reject her feeble claim that she forgot that she had recorded a lengthy speech by Cahill about the collective-bargaining process. Given that she had gone to great lengths to elicit and capture Anderson's statements on the same topic, I find it incredible that she would have forgotten the same behavior in relation to Cahill. Jones' dishonesty in response to the Employer's investigation violated the Employee Work Conduct Policy. In addition, the Employer has established that it imposed similar sanctions against at least one other employee who engaged in comparable misconduct. Thus, Joan Jeffries was discharged on March 14, 2006, for lying on her employment application. (R. Exh. 122.)

Finally, Slaughter concluded that Jones' recording of line team meetings containing confidential information and giving those recordings to an outsider justified her discharge. There can be no doubt that Jones recorded confidential proprietary discussions during the line team meeting process. I have listened to her recordings and note that among the topics discussed in the line team setting were machine problems, data collection issues, profitability of particular products, volume and cost of scrap, and customer complaints such as breakage and excess moisture. (R. Exh. 105.) These conversations were on the recording device that was given by Jones to Price.

The General Counsel asserts that this conduct does not justify Jones' discharge because the Employer has no confidentiality agreement with Jones that would preclude such conduct. He also asserts that the Employer does not take adequate steps to protect its proprietary information and that this deficiency deprives it of the right to sanction Jones for disclosing the information. I reject both of these arguments.

While the Employer does not have a confidentiality agreement with Jones, the Board does not require this in order to authorize the sanctioning of disclosure of proprietary or confidential information by an employee. Thus, in *Bell Federal Savings & Loan Assn.*, 214 NLRB 75, 77-78 (1974), an employee informed the union that the employer had received confidential telephone calls from his lawyer. In upholding the imposition of discipline against her, the Board agreed that the employer "had no published rule against the kind of disclosure

¹³⁶ Among the Company's work policies in its handbook is the requirement that employees "[b]e honest in your dealings with Interbake Foods, LLC" (GC Exh. 3(b), p. 37.)

¹³⁷ Among the handbook's listing of "Serious Misconduct" is "[d]isclosing, misusing, or removing from the premises any company . . . property unless authorized." (GC Exh. 3(b), p. 40.) By including the concept of disclosure of company property, I conclude that this policy was clearly designed to apply to conduct involving the provision of proprietary information to outsiders such as was done by Jones.

involved here." 214 NLRB at 77. While this was a factor to be considered, it did not preclude a finding that the employer had a right to control dissemination of such information and that it was "entitled to consider such conduct a breach of trust justifying discipline." 214 NLRB at 78.

Similarly, in *Roadway Express*, 271 NLRB 1238, 1239-1240 (1984), an employee was discharged for making copies of bills of lading and providing them to the union. Once again, there was no written confidentiality rule. The Board concluded that "[i]n such circumstances, an employer, regardless of whether it has a written rule, has a right to expect its employees not to go into its files and to take its business records for whatever purposes they wish, and it is not unreasonable for an employer to consider such conduct as justifying discipline." 271 NLRB at 1239. [Footnote omitted.]

I conclude that the absence of a confidentiality agreement prohibiting the disclosure of the contents of line team meetings to outside parties does not preclude the imposition of discipline for such conduct.¹³⁸ I also conclude that the nature of this conduct is such that it is not protected under the Act and the Board's precedents as it is inconsistent with the duties owed by an employee to her employer. See *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953) (Sec. 10(c) of the Act confirms the employer's right to discharge employee for "disloyalty").

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As to the General Counsel's second argument, I note that it again encompasses an attempt by the Government to instruct a private employer in how to conduct its business affairs. Thus, the General Counsel notes that Interbake requires its managerial employees to sign a confidentiality agreement, but does not require its production employees to do so. As a result, it is suggested that the Company has forfeited any right to sanction unauthorized disclosure of confidential and proprietary information by those production employees. In support of this argument, counsel cite a decision of the District Court for the Northern District of Iowa. In that case, *Interbake Foods, LLC v. Larry Tomasiello, et al.*, No. C-06-4089-MWB, this Employer sought relief against Tomasiello, its former production manager, for disclosure of trade secrets after he was hired by a competitor.¹³⁹ It is true that the judge was critical of aspects of the Company's efforts to protect those trade secrets.

Having studied the District Judge's scholarly, articulate, and occasionally humorous opinion, I conclude that the General Counsel ignores the basic thrust of the decision. Despite finding that there were gaps in the Employer's policies and practices, the court ultimately concluded that "Interbake has expended 'reasonable' efforts under the circumstances to maintain the secrecy of its trade secrets." (GC Exh. 173, p. 61.) As a result, the court awarded injunctive

¹³⁸ This is particularly true given that the Employer maintained a work rule against "disclosing" company property without prior authorization. (GC Exh. 3(b), p. 40.)

¹³⁹ The judge's opinion is located in this record as GC Exh. 173. I will cite to it from this exhibit.

relief. The judge noted that the Company derived considerable business success from its "secret processes" which give it a "unique and unrivaled competitive advantage." (GC Exh. 173, p. 36-37.) Indeed, the judge began his exposition with the following observation:

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Although the court has not imagined that ice cream sandwich wafers could spawn rivalries more intense that that between vanilla and chocolate, the court has discovered in this "trade secrets" case that rival makers of the "sandwich" wafers of ice cream sandwiches defend their proprietary information with as much zeal as any other entrepreneur seeking to secure an advantage in an increasingly sophisticated and competitive commercial market.

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(GC Exh. 173, p. 2.) There is no basis to conclude that this decision undermines the legitimacy of the Employer's reasonable expectation that all of its employees will refrain from the disclosure of propriety and confidential information to outside parties.¹⁴⁰

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In sum, I conclude that the General Counsel has failed to establish that Jones' discharge violated Section 8(a)(1) of the Act. I find that she was discharged due to her violation of multiple genuine and nondiscriminatory work rules and that her unprotected conduct justified the imposition of sanctions against her. The Act should not, and does not, protect employees from violating rules against smuggling recording devices into the production area, making secret recordings of confidential and proprietary information, disclosing those recordings to outside persons, and lying about these activities at investigatory interviews.

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While I have concluded that the Employer was justified in discharging Jones for her unprotected activities, the General Counsel further contends that, in fact, the Employer did not terminate her employment for this reason. He argues that, in reality, the Employer terminated

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¹⁴⁰ Beyond this, I note that the Employer does take steps to prevent such disclosure. In particular, it maintains a handbook policy prohibiting disclosure and goes to the trouble and expense of maintaining a secure and guarded perimeter around the facility. The fact that Jones was able to smuggle her recorder into and out of the plant does not demonstrate that the Employer is uninterested in protecting its confidential information.

Jones due to her involvement with the Union. If proven, such a motive could possibly render the discharge unlawful as a violation of Section 8(a)(3) of the Act.¹⁴¹ In such a case, a *Wright Line* motivational analysis is required.

The first steps of this analysis necessitate little discussion. Jones was an active union supporter during the 2007-2008 organizing effort. A coworker characterized her as among the most active supporters in the work force. There is certainly no doubt that the Employer was well aware of her activities and sympathies. For instance, Supervisor Anderson bore the brunt of Jones' displeasure over her articulation of the possible pitfalls in the collective-bargaining process. At the time of her discharge, the Employer was also obviously aware that Jones had attempted to assist the Union by making secret recordings of management officials' statements about that collective-bargaining process.

As to unlawful animus, I do not conclude that the General Counsel has demonstrated that the Employer's animus against Jones arose from any protected union activities as opposed to her unprotected misconduct. Nevertheless, as elsewhere in this decision, I will find that the General Counsel has carried his burden, albeit in a minimal fashion, by establishing that the Employer's supervisors took certain actions and made certain statements that interfered with the protected activities of union supporters among the work force. As a result, the initial burden of proof is met and the Employer must now demonstrate that it would have discharged Jones for reasons apart from her protected activities.

My discussion of the nature of Jones' conduct and my conclusion that her behavior in making secret recordings of confidential information, providing those to the Union, and lying about her actions were all unprotected activities that served as the overwhelming motivation for the Employer's decision to terminate her employment must inevitably lead to the conclusion that her discharge did not violate Section 8(a)(3). In this regard, I observe that the broad scope of her misconduct and the blatant nature of it are compelling evidence in support of the legitimacy of the Employer's motivation to fire her.

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Throughout this opinion, I have been of the view that the General Counsel has failed to examine the events with a broad perspective. The narrow focus simply on the presence of

¹⁴¹ In proceeding to make a *Wright Line* analysis in these circumstances, I am following the procedure used by the Board in *Ogihara America Corp.*, 347 NLRB 110 (2006), where, as here, the discharge of an employee was alleged to have violated Sec. 8(a)(1), as well as, Sec. 8(a)(3) and (4). Although the Board concluded that the employee's conduct was unprotected, it also went on to analyze the discharge under *Wright Line*. I would observe that the procedural question is not without some doubt. The Board has always held that motive is "wholly irrelevant" in discharge cases brought under Sec. 8(a)(1). *Cooper Thermometer Co.*, 154 NLRB 502, fn. 2 (1965). As a result, I do not see how a finding of unlawful animus under Sec. 8(a)(3) or (4) would make the discharge illegal. If the employer is privileged to discharge the employee under a Sec. 8(a)(1) analysis regardless of motive, this would appear to render the remaining issues moot.

organizing activity, some excessive efforts to thwart that activity by the Employer's supervisors, and the discharge of a number of union supporters has led counsel astray. As to her rationale for terminating Jones, I note that Slaughter said something particularly apt. She explained:

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[T]he fact that she participated in doing this [providing the recordings to the Union] secretly and without permission leads me to believe that it, maybe it was intended to do harm to the company. . . . You know, I don't care where you work, it's just not acceptable to do that.

10 (Tr. 3740-3741.)

I agree with Slaughter's contention that a realistic appraisal of an employer's view of the conduct expected from employees reinforces the conclusion that this Employer was genuinely concerned with the nature and potential consequences of Jones' conduct in an entirely reasonable and legitimate manner. A thought experiment may provide a useful illustration. Imagine that an employee of the Regional Office is an ardent supporter of the labor organization that represents employees of that office. She smuggles a recorder into the office and records conversations with supervisors at which they express their opinions regarding the union. In addition, she secretly records staff meetings at which confidential matters are discussed, including litigation strategies and tactics in pending cases. She provides those recordings to union officials for their transcription. If the issue were presented to the Federal Labor Relations Authority, is it likely that the Regional Director would argue that the employee's conduct was protected from sanction by the terms of the applicable labor laws? I suggest not. In this regard, see *Federal Mediation and Conciliation Service*, 9 FLRA 199 (1982) (Federal employer did not violate the FLRA when its general counsel warned a union supporter that, "management is within its rights to discipline any employee who does in fact disclose confidential information.").

At the last step in the *Wright Line* analysis, I conclude that this Employer has met its burden of proving that it would have discharged Jones for violating its work rules and for disclosing confidential information to outside parties, regardless of her involvement with the Union. As previously discussed, such a conclusion is supported by consideration of the full circumstances, including the Employer's valid rules, policies, and practices.

One final analysis must be performed. The General Counsel also asserts that Jones' discharge violated Section 8(a)(4) because it was made in retaliation for her testimony against the Employer. The Board holds that such a claim must be analyzed using the familiar *Wright Line* criteria. *McKesson Drug Co.*, 337 NLRB 935, 936 (2002). At the first steps, it is clear that

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¹⁴² As I have indicated, the most compelling circumstance given insufficient weight by the General Counsel is the fact that each alleged discriminatee engaged in serious misconduct that was well documented by the Employer.

Jones provided assistance to the General Counsel and the Charging Party by testifying as a prosecution witness in the trial of this case. Obviously, this was well-known to the Employer.

The next analytical step requires the General Counsel to meet the burden of proving that

Jones' discharge was motivated in significant degree by animus against her arising from her
testimony. The General Counsel's theory in this regard is summarized as follows: "That
[Melissa] Jones' testimony in these proceedings also served as the catalyst for her discharge is
not open to serious question." (GC Br. II, p. 37.) Of course, the problem with this argument
is that it confuses a discharge motivated by the fact that Jones testified with a discharge
motivated by what Jones actually revealed during that testimony. It was her admission that she
secretly recorded conversations in the production area and provided those recordings to outside
parties that motivated the Employer.

As counsel for the Employer notes, a judge, with the Board's subsequent approval, once characterized the General Counsel's similar theory as being, "absurd." *Los Angeles County District Council of Carpenters Local 1553 (Hughes Helicopters)*, 224 NLRB 350, 355 (1976). As the judge explained:

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I have found no case, and none has been cited for this novel proposition which holds in effect that neither an employer nor a union can use evidence of employee misconduct to punish the employee if the evidence of the misconduct was uncovered during the course of a Board proceeding through the employee's testimony. In other words, if any employer or a union discover for the first time during a Board hearing through the testimony of an employee that this employee is guilty of serious misconduct . . . which ordinarily would result in discipline, the employer or union is nevertheless precluded from disciplining the employee. The Act in my view does not call for such an absurd result.

The import of this conclusion was well described by another judge in *Teamsters Local 856* (Holiday Inn of Palo Alto-Stanford), 302 NLRB 572, 575 (1991), as follows:

Is the employee being punished for testifying against the party levying the discipline, or is the witness being punished because the testimony he gave adduced facts constituting misconduct which would result in the discipline no matter from what source the disciplining party learned of it? That is the lesson of *Hughes Helicopters*

¹⁴³ In the brief, the General Counsel mischaracterizes the Employer's position in one respect. The Employer has never claimed that Jones was fired because she lied in her trial testimony. Thus, the discussion of the Board's precedents regarding claims of perjury as justification for an employee's discharge is irrelevant.

Put another way, the Board certainly does not immunize its witnesses from the consequences of their testimony about any misconduct they may have committed. Such a policy would be entirely at odds with the Board's role as a law enforcement agency.

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In addressing the question posed by the judge in *Holiday Inn of Palo Alto*, supra, for reasons already discussed in detail, I find that this Employer discharged Jones solely because of the misconduct that she reported in her testimony. That misconduct was unprotected by the Act and was intolerable to this Employer as it constituted the violation of numerous rules and policies and involved potential harm to the Company through disclosure of confidential and proprietary information. The General Counsel has not met his burden of demonstrating that the Employer was motivated by unlawful animus against Jones arising from her role as a witness for the General Counsel in this proceeding.¹⁴⁴

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The final unfair labor practice charge in this lengthy case is the General Counsel's contention that the Employer's Media Relations Policy contained in its handbook violates Section 8(a)(1). (GC Exh. 148-H, pars. 5 and 12.) The Company argues that a reasonable reading of the policy yields a different conclusion.

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It is undisputed that both editions of the Employer's handbook contain a Media Relations Policy. After an explanatory preamble, the body of that policy provides as follows:

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Employees may not release information to the news media about Interbake activities or the activities of our parent companies. What should you do if a member of the news media, the government or a public interest group contacts you? It is Interbake's policy that all inquiries from the media and other organizations be referred to the corporate office in Richmond, VA. If it is appropriate, personnel from these Interbake offices may contact you to arrange for any interviews or speaking engagements in which you become involved. Please do not speak to any media, unless you are specifically authorized to do so.

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(GC Exhs. 3(a), pp. 47-48 and (b), p. 47.)

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In determining whether this policy is lawful under the Act, I will examine the Board's recent precedents and also holdings from older cases. In my view, it is necessary to undertake this historical exploration given current realities. It is the duty of the Board's judges to follow

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¹⁴⁴ Of course, it follows that, if I were to decide this claim at the final *Wright Line* step, I would determine that the Employer met its burden of showing that it would have discharged Jones for her misconduct regardless of her involvement in this litigation.

and apply Board policies as expressed in its current decisions. *Pathmark Stores*, 342 NLRB 378, 378, fn. 1 (2004) (judges have the "duty to apply established Board precedent which the Supreme Court has not reversed" in order to achieve "uniform and orderly administration" of the Act). Nevertheless, judges, although sometimes garbed in black, are not ostriches and must take cognizance of outside developments.

In recent years, the Board's authority has come under legal attack on several fronts. As to the issue before me, a good example may be found in *Crowne Plaza Hotel*, 352 NLRB 382 (2008) which appears to make authoritative statements as to the legality of media relations policies. However, in *Sheraton Anchorage*, 359 NLRB No. 95, slip op. at 3, fn. 8 (2013), the Board stressed that *Crowne Plaza* could no longer be relied on in light of the Supreme Court's holding that a two-member Board lacked authority to issue rulings. See *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). More recently, the Board's authority has also been under challenge. See *NLRB v. Enterprise Leasing Company Southeast, LLC*, ___F.3d ___ (4th Cir. 2013), 2013 WL 3722388; *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013); and *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 133 S. Ct. 2861 (2013), cf. *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F. 2d 1008 (9th Cir. 1985); and *U.S. v. Allocco*, 305 F. 2d 704 (2d Cir. 1962). For this reason, it is advisable to examine both current and more distant precedents.

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There are two separate issues involved in the assessment of the Employer's Media Relations Policy. In the first place, that policy clearly prohibits employees from speaking to the news media, "unless you are specifically authorized to do so." (GC Exh. 3(b), p. 47.) In *Sheraton Anchorage*, supra, slip op. at 4, the Board very recently held that:

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Employees enjoy a Section 7 right to publicize a labor dispute, which includes communicating terms and conditions of employment to the media for dissemination to the public at large. The Respondent's rule, which bars employees from communicating "any information" regarding themselves to the media, plainly restrains such protected activity. [Citations omitted.]

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This holding followed on the heels of a similar conclusion reached by the Board in DirecTV U.S., 359 NLRB No. 54 (2013). 145

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In my view, the Board's current holdings are consistent with its historical position. In 1993, the Board adopted a judge's observation that "employees have a right under Section 7 of the Act to convey their complaints or grievances against their employers to representatives of the

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¹⁴⁵ Counsel for the General Counsel filed a notice of supplemental authority on February 14, 2013, directing my attention to the *DirecTV* decision. I have taken note of this citation pursuant to *Reliant Energy*, 339 NLRB 66 (2003).

media." *Leather Center, Inc.*, 312 NLRB 521, 528 (1993) [Footnote omitted.] Three years earlier, the Board, itself, noted that it had "found employees' communications about their working conditions to be protected when directed to . . . a news reporter, and the public in general." *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 (1990). [Footnotes omitted.]

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Because the plain language of Interbake's Media Relations Policy prohibits its employees from communicating with news media regarding their terms and conditions of employment, it is an overbroad restriction on their right to engage in concerted activities. As a consequence, it violates Section 8(a)(1) of the Act.

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The same policy contains another fatal flaw. It requires employees to refer all inquiries from "the media and other organizations" to the corporate offices in Richmond. (GC Exh. 3(b), p. 47.) Such other organizations are defined in the policy in a manner that specifically includes "the government." (GC Exh. 3(b), p. 47.) Slaughter confirmed that the intent of the policy was to require employees to report any contacts with government authorities to the corporate offices. In *DirecTV*, supra, slip op. at 3, the Board found a similar policy to be unlawful because it "would lead reasonable employees to conclude that they would be required to contact the Respondent's security department before cooperating with a Board investigation."

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Once again, I have examined earlier precedents and determined that they are consistent in this regard. In *Regional Medical Center at Memphis*, 343 NLRB 346, 366 (2004), the Board adopted a judge's holding that a work rule requiring notification to the employer of contacts with government officials was unlawful "on its face." This was consistent with the Board's prior adoption of another judge's discussion of the issue of a work rule requiring employees to provide notification to the company's lawyers of all contacts with government agents:

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The provision plainly prohibits employees from volunteering information to a Federal agent or signing any written statement such as an affidavit without express approval from a company attorney. Seeking employee information and obtaining affidavits are both normal Board investigatory procedures, and Section 8(a)(4) of the Act specifically prohibits discrimination against any employee because he or she has given testimony in a Board investigation. Respondent's provision, in requiring employees to obtain preapproval from a company attorney, necessarily restrains and coerces employees in their right to provide evidence to Board agents or to testify in Board proceedings. At the very least, it would require an employee to divulge his or her identity to the company as someone interested in the Board or in whom the Board is interested. In addition to chilling employees' unrestrained involvement in Board processes, the provision effectively acts as a form of interrogation. In either instance it restrains and coerces employees in the exercise of their Section 7 rights.

Jack in the Box Distribution Center Systems, 339 NLRB 40, 54 (2003).

Because Interbake's policy requires employees to report inquiries from government agents to the corporate offices, it restrains and interferes with the protected activities of its employees. Similarly, because the policy requires employees to obtain specific authorization to speak with government agents, it again restrains and interferes with such protected rights. As a result, the Media Relations Policy violates Section 8(a)(1) of the Act.

G. A Final Comment Regarding Unlawful Discrimination

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As discussed at length, the General Counsel alleged that this Employer discriminated against some of its employees who supported the Union by imposing disciplinary sanctions, most notably including the discharge of seven of them from its employ. After careful analysis, I have concluded that the Employer did not engage in any such acts of unlawful discrimination. This stark divergence in viewpoint with the General Counsel is troubling, particularly given that all arms of the Board are mandated to apply the same legal principles in discharging our responsibility to enforce the Act. As a result, I deem it appropriate to elaborate a bit as to my sense of why there has been such disagreement about the actions of this Employer.

I have already indicated that I believe the key principle involved here is the duty to conduct a wide-ranging and realistic appraisal of the actions of the organizations and individuals involved in this lawsuit. Counsel for the General Counsel have viewed this Employer as harboring an inalterable and depraved antipathy toward those of its employees who favored the Union. They find some degree of support in the fact that over the years involved in this litigation, several corporate managers and supervisors have made statements and engaged in conduct that served to interfere with and restrain employees in the exercise of their right to seek representation.

While I agree that nobody is going to award this Employer the labor relations equivalent of a Good Conduct Metal, counsel for the General Counsel consistently overlook other significant aspects of this Employer's behavior. The evidence demonstrated that Interbake and its corporate parent have had long and productive collective-bargaining relationships with this Union. Indeed, the Union's international vice president observed that it would be "out of character" for the Employer to engage in unlawful behavior towards the Union. (R. Exh. 1, p. 2.) Similarly, the Union's president observed that its allegations against the Employer were "unprecedented" in the history of their labor relations. (R. Exh. 52, p. 2.) In addition, the

¹⁴⁶ Having been a prosecutor in a local court earlier in my legal career, I do recognize that the factors that guide the exercise of prosecutorial discretion necessarily differ to some extent from those employed by the judges who must preside at such prosecutions. Nevertheless, I remain troubled by the substantially divergent views of the generally admitted portions of the evidentiary record here.

¹⁴⁷ For instance, the General Counsel seeks imposition of a broad cease-and-desist order in this case. Such a severe remedy is reserved for incorrigible offenders. *Hickmott Foods*, 242 NLRB 1357 (1979).

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Employer entered into a private election agreement at Front Royal that included granting access inside the facility to union organizers for the purpose of meeting with employees. It is conceded that the Company did not violate this agreement. Secret recordings also shed probative light on the manner in which company officials sought to discuss the representation issue. From those recordings, one learns that Supervisor Anderson actually opined that production employees should support the idea of union representation. Operations Manager Cahill expressed opposition to this concept, but in a rather lengthy talk he confined himself to reasoned and respectful argument that was careful to avoid any hint of threat or benefit. Finally, it is noteworthy that the Employer was not running a sweatshop. Employees received a broad package of benefits. Beyond this, the record contains statements by two strong supporters of the Union indicating that they were well satisfied with the Employer's wages. 148

All of this does not in any way serve to excuse those instances when the Employer broke the law. It does, however, illustrate the complexities of human interactions and the need to take a balanced and nuanced approach to these parties' motivations. In particular, in my years of experience as a labor relations judge, I have found that the level of animus required to punish an employee by depriving him or her of the means of earning a living in retaliation for support of a union is something qualitatively different from the will to break the rules in order to defeat a union in an election by making promises of benefit or threats of future harm. While making such statements is evidence of the possible existence of the degree of animus required to inflict punishment on the innocent, it is only a piece of the evidentiary puzzle and must be weighed in the balance against such other factors as those I have just outlined.

In my view, counsel for the General Counsel have erred through the narrowness of the lens they have used to examine the facts. They have overemphasized the circumstance that seven employees were fired during the course of an organizing campaign. In the first place, it must be recalled that this is a large facility with a newly-hired work force. The General Counsel introduced into evidence the statistics regarding the firing of employees at this large plant. Those statistics reveal that during the time period involved in this litigation, the Employer fired 134 people for what it deemed cause. ¹⁴⁹ (GC Exh. 150.) It is hardly surprising that at least seven of them would be union supporters to one degree or another.

¹⁴⁸ I am referring to Janice Reece's testimony that the Employer's benefits and pay are "great," and Melissa Jones' statement to Anderson that, "I'm not interested in getting more money. I never got paid more on a job than what I'm getting paid right now." (Tr. 158, R. Exh. 43, p. 3.) Of course, I do not mean to suggest that employees had no reason to desire union representation. I have no opinion on that topic and emphasize that, under the Act, this is a decision that is properly and exclusively left to the judgment of each individual employee.

¹⁴⁹ In other words, this figure does not include layoffs.

Beyond this, the inescapable fact is that each of the seven discharged employees involved in this case engaged in behavior that this Employer legitimately considered to be misconduct. In several instances, the behavior was of a nature that any employer would find unacceptable. Examples include repetitive acts of insubordination, refusal to accept a valid shift change assignment, and secretly recording and disclosing confidential information. In other cases, employees violated safety rules at a time when the Employer was making a concerted and genuine effort to improve the facility's record of workplace safety. In two instances, termination resulted from a very lengthy history of unsafe behavior. In another two examples, termination stemmed from a genuine and legitimate decision to impose and enforce a zero tolerance policy to prevent serious injury to employees. In no instance did the Employer trump up a disciplinary violation or grasp at a pretextual reason to rid itself of a union adherent.

In my opinion, counsel for the General Counsel have overestimated the probative value of the coincidence in timing of the discharge of union supporters during an organizing campaign. They have engaged in the common logical fallacy known as *post hoc, ergo proper hoc* (after this, therefore because of this). As the Seventh Circuit has warned, it is error for the Board or its agents to apply "in effect a presumption that the discharge of a union adherent during an organizing campaign is motivated by hostility to the union, a presumption that can be rebutted only by a showing that the discharge was for good cause, and maybe not even then. . . . A union card does not insulate bad behavior. The National Labor Relations Act does not give union adherents job tenure, even during union organizing campaigns. The fact that a union is trying to organize the work force does not suspend the company's right to hire and fire." *Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 690 (2000). [Internal punctuation and citation omitted.]

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I recognize that this is an age-old problem in the Board's jurisprudence. When I was a schoolboy, the Fifth Circuit noted that the type of error I am discussing was a "frequent one." *NLRB v. McGahey*, 233 F.2d 406, 412 (1956). The court went on to explain in language that goes to the heart of this issue:

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With discharge of employees a normal, lawful, legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, *the record taken as a whole* must present a substantial basis of believable evidence pointing toward the unlawful one.

¹⁵⁰ The classic example of this false reasoning is the conclusion that, because the rooster crows at dawn, he is responsible for bringing the sunrise.

233 F.2d at 414. [Emphasis added. Citations omitted.] See also *Baltz Bros. Packing Co.*, 153 NLRB 1114, 1122, fn. 15 (1965) ("well settled that an employee's known union adherence and prominence in union activity does not grant him any right to special treatment in case of clear misconduct, or immunity from discipline or discharge for such misconduct").

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In our democracy, the Board's authority ultimately depends on public acceptance, particularly by its constituencies (labor and management) and the lawmakers who oversee its operations. In turn, that support can only be obtained by the balanced, neutral, and practical assessment of the conduct of the parties involved in our cases. This goal is best achieved by a wide-ranging evaluation that rejects rote presumptions and focuses on the objective and dispassionate appraisal of the realities of the workplace.

III. The Representation Issues

As noted at the outset of this lengthy decision, there are representation issues that must be resolved now that the unfair labor practice allegations have been adjudicated. These issues are set forth in the Regional Director's Report on Objections and Challenged Ballots concerning the election held on April 16, 2008. (GC Exh. 1(m).)

The Regional Director noted that the Board agent conducting the election challenged the ballots of five individuals because their names did not appear on the list of eligible voters. The Employer contends that each of these individuals had been discharged before the election and was no longer an employee. Subsequently, the Charging Party withdrew the unfair labor practice allegation involving the discharge of one of the challenged voters, Cathy Stickley. The remaining challenges involve the ballots of Milo Malcomb, John Robinson, Clyde Stovall, and Phillip Underwood. Because I have concluded that each of these individuals was lawfully discharged by the Employer prior to the election, I sustain the challenges to these four remaining ballots.

With this determination, the revised tally of ballots is:

Votes cast for Petitioner: 97
Votes cast against participating labor organization: 100
Valid ballots counted: 197

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The Regional Director also noted that the Union (the Petitioner) filed timely objections alleging conduct by the Employer affecting the results of the election. While 12 such objections

¹⁵¹ As Chairman Pearce recently put it, the Board's role is to provide "[e]mployers and employees alike . . . an impartial forum for the resolution of disputes." Statement of National Labor Relations Board Chairman Mark Gaston Pierce on the Senate Votes to Confirm President Obama's Nominees to the NLRB, issued July 30, 2013.

were filed, the Regional Director reported that he had granted the Union's request to withdraw Objections 1, 2, 3, 7, 9, 10, 12, and the first portion of 4. The remaining objections before me for disposition are Objections 5, 6, 8, and the second portion of 4.

The second portion of Objection 4 concerns the termination of Clyde Stovall on March 12, 2008. Because I have determined that Stovall's discharge by the Employer was not unlawful, I overrule this objection.

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Objection 5 involves the allegation that, on March 13, 2008, Supervisor Halterman told employees that, if the Union were chosen as representative and sought improved conditions of employment, the Company would take away other benefits such as vacation days or increase the cost of benefits such as health insurance. Since I have concluded that the General Counsel met his burden of proving this allegation as an unfair labor practice, I sustain this objection.

Objection 6 alleges that, also on March 13, 2008, Supervisor Halterman told employees that if the Union were selected as their representative, the Employer would no longer permit employees to change their vacation schedules. Because I found that the General Counsel met his burden of proving this allegation as an unfair labor practice, I sustain the objection.

Objection 8 concerns the termination of John Robinson on March 14, 2008. As I have concluded that the circumstances involved in Robinson's cessation of employment were not unlawful, I overrule this objection.

In their posttrial brief, counsel for the General Counsel (presumably on behalf of the Petitioner) seek an order setting aside the election held on April 16, 2008, and directing a new election to be held at a time when the employees would be able to vote in an atmosphere free from coercion. I must assess this request with reference to the Board's established standards.

Examination of those standards begins with the Board's famous description in *General Shoe Corp.*, 77 NLRB 124, 127 (1948), enf. 192 F.2d 504 (6th Cir. 1951), cert. denied 343 U.S. 904 (1952):

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

While this metaphor has become iconic, I find it a bit confusing. On the one hand, the Board strives to reach an ideal condition for the conduct of elections, while on the other hand, it

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observes that it will be extremely rare when this lofty goal is not achieved. While this is paradoxical, I grasp that there is no laboratory that is without some risk of contamination (and this would have been even truer in 1948). I take the Board's meaning as being that, while the goal is perfection, the reality is that elections will rarely be free of some conduct by the parties that may be viewed as a potential contaminant.¹⁵²

In any event, it has been clear that the Board has no automatic rule requiring that an election result be set aside simply because an objection to a party's conduct during that election process has been sustained. See, for example, *Coca Cola Bottling Co.*, 232 NLRB 717, 718 (1977), holding that there was no basis to set aside an election where the employer engaged in "isolated incidents" of misconduct.

Some years later, citing *Coca Cola Bottling*, the Board articulated specific standards to gauge when an election result should be accepted despite the existence of objectionable conduct, including conduct that constituted unfair labor practices. In *Clark Equipment Co.*, 278 NLRB 498, 505 (1986), it held that an election should not be set aside when it is "virtually impossible" to conclude that misconduct affected the results. In reaching such a determination, the factors to be evaluated included the number of violations, their severity, the extent of the dissemination of knowledge of the misconduct, and the size of the electorate. Applying these factors in *Clark*, the Board declined to set aside the election despite instances of misconduct affecting eight different employees in a work force of over 800 persons.

Over the years, the Board has expanded the list of factors a bit. In *PPG Aerospace Industries*, 355 NLRB 103, 106 (2010), Former Members Liebman and Schaumber provided a list consisting of "the number of violations, their severity, the extent of their dissemination, the number of employees affected, the size of the bargaining unit, the closeness of the election, and the violations' proximity to the election." [Citation omitted.] I will now examine each of these relevant factors as they relate to the circumstances presented in this case.

I have sustained two of the Petitioner's objections, but it must be noted that they both relate to statements that were made in the same conversation by the same speaker. Although styled as two objections, in reality, they represent one instance of misconduct. It occurred on March 13, 2008, on the production floor. Line Supervisor Halterman was handing out a piece of company

¹⁵² Such an interpretation would be consistent with the Eight Circuit's observation that "[a] certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election. For an election to be set aside, however, it must be shown that an atmosphere of fear and coercion has vitiated free choice." *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (1984).

¹⁵³ *PPG Aerospace Industries* was a two-member Board decision of the type subsequently found to have been unauthorized under the Act. See *New Process Steel, L.P. v. NLRB,* 130 S. Ct. 2635 (2010). I do not cite it as authoritative precedent. Nevertheless, it represents persuasive commentary on the issue being discussed.

literature that addressed the topic of collective bargaining. As he did so, he became involved in a discussion of this topic with two mixers, Devin Long and Randy Brooks. ¹⁵⁴ I have found that Halterman told the two men that, during collective bargaining, the Company would have "financial boundaries," that it would not transgress. (Tr. 3280.) As a result, if management made concessions to the Union in one area, they would have to take away existing financial benefits in some other area, such as the cost of health insurance. He drew a pie chart to illustrate his point. In addition, in discussing the effect of union representation, he asserted that the Employer would no longer be able to permit employees to change their vacation days as was done under current procedures.

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Turning to the relevant factors, I begin by noting that the number of violations was small. Throughout the critical period, these statements were the only proven instances of misconduct. As a result, this is properly characterized as an "isolated incident." *Woodbridge Foam Fabricating*, 329 NLRB 841, 851 (1999) ("sole incident" insufficient to warrant setting aside election).

As to the severity of the misconduct, it did not involve any unlawful discrimination or

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discharge of employees, nor did it rise to the level of a prediction of plant closure or other drastic consequence of unionization. In addition, I find that the coercive effect of Halterman's statements was mitigated by two factors. In the first place, the entire discussion was prompted by Halterman's distribution of a piece of literature from the Company that addressed the same topic. Long testified that he read this handout. It contains a lengthy description of the collective-bargaining process. While that description is slanted toward the Company's viewpoint, there is no contention that it was inaccurate or unlawful. It plainly and emphatically informs employees that, as a result of collective bargaining, "things could get better, stay the same, or get worse." (GC Exh. 134B, p. 2.) [Italics and underlining in the original.] Overall, it in no way endorses Halterman's assertion that the Employer would not grant a package of benefits that was better than the current package. This served to mitigate the impact of Halterman's remarks.

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Second, the record revealed that Halterman was the one supervisor most prone to bluster. In a penetrating insight into what the employees felt about his patter, after one of his windy comments, Ruth Peterson remarked to Malcomb, "[D]on't pay no attention to what he says, he's just an asshole." (Tr. 1348.) Halterman's reputation preceded him and mitigated the impact of his statements. In addition, the surrounding circumstances also underscore the limited impact of Halterman's speech. Thus, as the Board has explained, "[w]ords spoken by a plant owner . . . in a formal meeting have a different level of seriousness than different words used during casual conversation by a low-level plant supervisor." *Crown Bolt, Inc.*, 343 NLRB 776, 779 (2004). Such was the case here. This is particularly true since Halterman's status as a line supervisor made it apparent that he would not be involved in formulating the Employer's positions during

¹⁵⁴ Neither side called Brooks as a witness regarding these events.

collective bargaining or in making any new policy determinations at to such items as vacation scheduling. Given his position, his statements were a classic example of empty threats. See *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984) (capability of carrying out threat is a relevant factor in assessing degree of coercion).

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The next issue is the extent of dissemination of Halterman's remarks. Naturally, the more widespread the knowledge about his assertions, the greater potential effect on the electorate. The Board requires the petitioning party to prove the extent of any dissemination and its impact on the electorate. *Crown Bolt*, supra at 779. The only testimony presented on behalf of the Petitioner was that of Long. He never reported that he discussed Halterman's statements on March 13 with any coworkers. There is no evidence from which I could conclude or infer that employees other than Long and Brooks were aware of Halterman's statements. There was no dissemination beyond the confines of the three men involved in the discussion. This also answers the next criterion to be addressed. The number of employees affected by Halterman's remarks was two. This represents a very small fraction of the 197 voters in the election.

Another factor cited by the Board is the proximity of the misconduct to the date of the actual election. Here, Halterman made his statements on March 13 and the election was held on April 16. There were no intervening instances of further misconduct and the parties campaigned vigorously during the month prior to the election. In *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1223 (2004), the Board cited the passage of one week between the misconduct and the voting as evidence that it had been virtually impossible for the misconduct to have affected the outcome. See also *Recycle America*, 310 NLRB 629 (1993) (where last incident of misconduct occurred one month prior to election, it was insufficient to have affected the results). The timing of the misconduct does not support the Petitioner's position.

Thus far, I have concluded that all of the relevant factors discussed fail to provide an evidentiary basis for setting aside this election. I must now focus on the final factor, the only one which does tend to support the Petitioner's claim for relief. That factor is the closeness of the vote tally. There is no doubt that this was a close vote. Is this fact sufficient to justify setting aside that vote?

In the first instance, I note that the Board could have easily promulgated a policy that any misconduct prior to an election whose outcome was closely decided would automatically require a rerun. It chose not do to so. Inherent in that choice is the recognition that even close elections may be sufficiently free and fair despite some degree of misconduct. It then becomes a matter of assessing that degree of misconduct.

In making these observations, I am not engaging in speculation. The Board spelled all of this out quite clearly in *Accubuilt, Inc.*, 340 NLRB 1337 (2003):

Although the Board will pay particular attention to the fairness of close elections, . . . the *Westwood Horizons* standard¹⁵⁵ applies even where the election margin is narrow. Thus, in accordance with precedent, we assess whether a general atmosphere of fear and reprisal existed in the Employer's plant, rather than merely comparing the number of employees subject to any sort of threats against the vote margin. We find that the four alleged threats here, known to no more than three employees in a unit of over 150, did not create a general atmosphere of fear and reprisal.

10 See also *Multi-Flow Dispensers of Toledo, Inc. v. NLRB*, 340 Fed. Appx. 275 (6th Cir. 2009) (closeness of election does not warrant setting it aside where the objections consist of only "a handful of isolated incidents").

In assessing the significance of the closeness of this election, I think it is important to view this factor in conjunction with the lack of any proof of dissemination of Halterman's assertions beyond the two persons who actually heard them. Of those two, Long was a union supporter who reacted by reporting Halterman's conduct to the Union and testifying against the Employer at the trial. It strikes me as highly unlikely that Long's vote was influenced by Halterman's improper statements. As to Brooks, the record is entirely silent regarding his views.

If one were to assume that he had favored the Union, but changed his opinion in response to Halterman's unlawful attempt to interfere with him, the ultimate outcome of the election would have remained the same. This lends support to my conclusion that it is virtually impossible to conclude that Halterman's misconduct affected the result of this election.

In accord with the reasoning of the Board in *Accubuilt*, supra, I find that the Petitioner has failed to meet its burden of proving that the isolated remarks by a low-level supervisor that were not disseminated or rejuvenated were sufficient to create a general atmosphere of fear and reprisal such that it affected the outcome of even this close election. To the contrary, the evidence shows that these statements were typical bluster from a low-level supervisor who was not held in any esteem and whose comments were unlikely to have been taken seriously by anyone. They cannot support the relief sought here. I will recommend that the revised results of the April 16, 2008 election be certified.

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¹⁵⁵ That standard was quoted as follows, "[t]he Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out; and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was 'rejuvenated' at or near the time of the election." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). None of these factors favor this Petitioner.

CONCLUSIONS OF LAW

- 1. The Employer has interfered with, coerced, and restrained its employees in the exercise of their rights under the Act in violation of Section 8(a)(1) by:
- (a) Making general threats to employees that their protected union activities would result in adverse consequences to them.
- (b) Threatening employees with loss of benefits if they elect to have union representation.

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- (c) Prohibiting employees from discussing the Union while present on the production line.
 - (d) Removing union literature from the employees' break room.
 - (e) Engaging in unlawful surveillance of handbilling activities by its employees.
- (f) Calling the police to unlawfully interfere with handbilling activities of its 20 employees.
 - (g) Creating an unlawful impression of surveillance of its employees' protected union activities.
- 25 (h) Promulgating an amendment to its existing Solicitation and Distribution Policy in response to its employees' protected union activities.
 - (i) Promulgating and maintaining a Media Relations Policy in its employee handbook that unlawfully interferes with its employees' protected activities.
 - 2. The Employer has not violated the Act in any other manner alleged by the General Counsel in the consolidated complaints issued on July 31, 2008, and July 7, 2009.
- 3. The Petitioner has failed to meet its burden of proving that the Employer engaged in objectionable misconduct to the extent that it affected the outcome of the election held on April 16, 2008.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I will order that the customary notice be posted and published in the usual manner.

On June 12, 2006, the Employer issued an unlawful amendment to its solicitation and distribution policy entitled, Reminder of Interbake's Solicitation/Distribution Policy. (GC Exh. 4.) I will order that this document be rescinded.

The Employer has maintained an unlawful Media Relations Policy in its handbook. (GC Exhs. 3(a), pp. 47-48, and (b), pp. 46-47.) I will also order that this be rescinded. I will authorize the Employer to choose from the alternatives provided by the Board as follows:

The Respondent may comply with our Order by rescinding the unlawful provision[] and republishing its employee handbook without [it]. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rule [has] been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rule[], until it republishes the handbook without the unlawful provision[]. Thereafter, any copies of the handbook that are printed with the unlawful rule[] must include the new inserts before being distributed to employees.

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Guardsmark, LLC, 344 NLRB 809, 812, fn. 8 (2005). [Citation omitted.]

I note that the General Counsel has requested an extraordinary remedy consisting of the issuance of a broad cease-and-desist order. Of course, I grasp that this request is largely premised on the General Counsel's view, which I have rejected, that the Employer unlawfully discharged a number of union sympathizers.

The Board's standards for consideration of a broad order require that the respondent be found to have a proclivity to violate the Act or have engaged in egregious or widespread misconduct manifesting an attitude of opposition to the purposes of the Act. *Five Star Mfg., Inc.,* 348 NLRB 1301, 1302 (2006), enf. 278 Fed. Appx. 697 (8th Cir. 2008), citing *Hickmott Foods,* 242 NLRB 1357 (1979). Although this Employer has violated Section 8(a)(1) in a number of instances over the years involved in this litigation, I do not conclude that the General Counsel has shown that it has a proclivity to engage in such misconduct. I also do not find that the misconduct that has been proven is of the egregious or widespread nature required to support the issuance of a broad order. I conclude that the Board's usual measures are reasonably calculated to secure the Employer's future compliance with the Act.

Finally, in his posttrial brief, counsel for the Employer asks that I waive any notice posting as to unfair labor practices which occurred prior to the parties' original settlement agreement entered into in 2007. (R. Br. p. 167, fn. 26.) He notes that such violations would have been addressed in the notice that was posted at that time. That settlement was later revoked by the Regional Director.

Counsel does not cite any authority that would authorize a judge to waive the Board's customary notice posting and I know of no such precedent.¹⁵⁶ In any event, my order will necessarily require a notice posting for subsequent violations. Since that notice will be prepared by the Regional Office for posting by the Employer, I cannot perceive any additional burden to the Employer in having the notice include all of the violations that I have adjudicated. Therefore, I decline to abbreviate the notice in the manner suggested.

ORDER

The Respondent, Interbake Foods, LLC, of Front Royal, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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- 15 (a) Making general threats to employees that their protected union activities will result in adverse consequences to them.
 - (b) Threatening employees with loss of benefits if they elect to have union representation.
 - (c) Prohibiting employees from discussing the Union while present on the production line.
 - (d) Unlawfully removing union literature from the employees' breakroom.
 - (e) Engaging in unlawful surveillance of handbilling activities by its employees.
 - (f) Calling the police to unlawfully interfere with the handbilling activities of its employees.
 - (g) Creating an unlawful impression of surveillance of its employees' protected union activities.
 - (h) Promulgating amendments to its existing Solicitation and Distribution Policy in response to its employees' protected union activities.
 - (i) Promulgating and maintaining a Media Relations Policy in its employee

¹⁵⁶ I do note that, very recently, where a respondent objected to a judge's rescission remedy because it contended that it had already rescinded the unlawful policy, the Board suggested that such an issue could be raised in a compliance proceeding. *Communications Workers of America Local 4309 (AT&T Midwest)*, 359 NLRB No. 13, slip op. at 2-3 (2013).

handbook that unlawfully interferes with its employees' protected activities.

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(j) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Within 14 days from the date of the Board's Order, rescind in its entirety, in writing, its document entitled Reminder of Interbake's Solicitation/Distribution Policy (GC Exh. 4) issued to its employees on June 12, 2006.
- (b) Within 14 days from the date of the Board's Order, rescind its Media Relations Policy contained in its employee handbook (GC Exh. 3(b), pp. 46-47) in its entirety, in writing, in the manner set forth in the remedy section of this decision.
- (c) Within 14 days after service by the Region, post at its facility in Front Royal, Virginia, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2006.
- (d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
- 35 IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act not specifically found.

¹⁵⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

CERTIFICATION OF ELECTION 158

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Bakery, Confectionary, Tobacco Workers and Grain Millers International Union (BCTGM), Local 68, and that it is not the exclusive representative of these bargaining unit employees.

	Dated, Washington, D.C., August 30, 2013.	
10		Paul Buxbaum Administrative Law Judge

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Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report on Election may be filed with the Board in Washington, D.C., within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Board in Washington by **September 13, 2013.**

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT make general threats to our employees that their protected union activities will result in adverse consequences to them.

WE WILL NOT threaten our employees with loss of benefits if they elect to have union representation.

WE WILL NOT prohibit our employees from talking about a union while they are on the production floor.

WE WILL NOT unlawfully remove union literature from our employees' breakroom.

WE WILL NOT engage in unlawful surveillance of our employees' handbilling activities.

WE WILL NOT unlawfully interfere with our employee's handbilling activities by calling the police.

WE WILL NOT unlawfully create an impression that we have engaged in surveillance of our employees' protected union activities.

WE WILL NOT promulgate amendments to our existing work rules and policies in response to the protected union activities of our employees.

WE WIIL NOT implement and maintain media relations rules and policies that unlawfully interfere with our employees' protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by Federal Labor Law.

WE WILL, within 14 days from the date of the Board's Order, rescind in its entirety our document issued on June 12, 2006, entitled Reminder of Interbake's Solicitation/Distribution Policy.

WE WILL, within 14 days from the date of the Board's Order, rescind in its entirety our Media Relations Policy contained in our employee handbook.

		INTERBAKE FOODS, LLC	
		(Employer)	
Dated	By		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-4061 (410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.